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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1314

WILLIAM E. ROBERTS
and
JOHN P. BUCHAN,
Petitioners,

vs.

LEONARD BARRACK, SELMA MOLDER AND PEARL SINGER, AS CO-EXECUTORS OF THE ESTATE OF SYLVIA BARRACK, DECEASED, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, William E. Roberts and John P. Buchan, respectfully pray that a writ of certiorari issue to review the decision and judgment of the Court of Appeals for the Ninth Circuit in the above actions.

A separate petition requesting review of the same decision was filed on March 5, 1976 (No. 75-1258).

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 524 F.2d 891 and is reproduced as Appendix A hereto. The prior

opinion of the District Court for the Northern District of California has not been officially reported; it appears at Appendix B.

JURISDICTION

The opinion and judgment of the Ninth Circuit were filed on September 25, 1975. A timely petition for rehearing was denied by order of December 16, 1975.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

This Petition arises out of an order certifying a class action for alleged violation of § 10b of the Securities Exchange Act (15 U.S.C. § 78j[b]) and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5. The class was certified on behalf of all purchasers of Ampex Corporation securities during a 27-month period from May, 1970 to August, 1972. Plaintiffs (Respondents here) contend that, during this period, they and other class members were misled by misrepresentations concerning Ampex's financial condition and prospects. These purported misrepresentations involved such diverse matters as earnings projections, inventory valuation, asset to liability ratios, adequacy of reserves for contingent liabilities and treatment of deferred research and development expenses (See App. B, pp. 40-41), and were contained in approximately 45 separate documents issued during the class period. *There is no allegation of self-dealing or profit-making by any of the defendants.*

The order certifying the above class was affirmed by the Ninth Circuit on the ground that the policies underlying Rule 10b-5 require a liberal application of class action standards, including, if necessary to permit class

certification, a relaxation of the requirements of both the securities laws and Rule 23.

Although the broad issue raised here is the proper interplay of Rule 10b-5 and Rule 23 standards, that issue is presented more specifically through the following three questions:

(1) Is the decision below materially inconsistent with *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975)?

(2) Should *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972) be extended to preclude evidence of reliance (either affirmatively or by way of defense) in misrepresentation, as opposed to non-disclosure, cases?

(3) Do the policies underlying the securities laws require courts routinely to certify class actions in 10b-5 cases?

STATUTES AND RULES INVOLVED

The statutes and rules involved are:

Section 10-b of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder; and

Rule 23, Fed. R. Civ. P.

They are set forth in Appendix C.

STATEMENT OF THE CASE

(1) Nature of the Action.

This is one of several purported class actions filed against Ampex Corporation, its principal officers and directors (including petitioners Roberts and Buchan) and its auditors, Touche Ross & Co. Plaintiffs claim that over a 27-month period, the defendants in various respects misrepresented the financial condition and outlook of Ampex

in approximately 45 separate financial reports and releases. App. A, p. 19.

Plaintiffs are among the 100,000 or so persons who bought 21,000,000 shares of Ampex stock and $50,000,000 of its debentures during the period in question in 120,000 separate transactions.[1] See App. A, p. 18; App. B, pp. 40-41. Plaintiffs contend that, as a result of defendants' various misrepresentations, the value of Ampex stock was artificially inflated, although the amount of the inflation varied as the result of certain "partial disclosures" and other corrective steps which had the dual effect of diminishing the inflation in the price of the stock while "lulling investors into believing the corporation's financial position was finally stable when, in reality, more distressing financial news was forthcoming" (App. B, p. 41).

As noted above, while plaintiffs broadly assert a failure to depict accurately Ampex's economic posture throughout the class period—and consequently a violation of duties owed to Ampex investors under Rule 10b-5—there are no allegations of self-dealing or other windfall gain by the defendants. In fact, there has been no serious contention that defendants were other than negligent in failing to ascertain or disclose the true facts respecting the company's condition.[2]

(2) Proceedings Below.

(a) *The Complaint.* This action was commenced on January 28, 1972 in the Eastern District of Pennsylvania

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[1]Approximately one-third of the investors included in the class not only purchased but *resold* some or all of their Ampex shares during the class period. App. B, p. 41 (n. 6).

[2]The only arguable exception to the foregoing was a claim that defendant Roberts sold Ampex stock owned by him in December, 1971 (at a substantial *loss*) on the basis of inside information. Plaintiffs' derivative claim challenging that transaction was dismissed by the District Court on April 1, 1974 for failure to state a claim upon which relief could be granted.

by Mrs. Sylvia Barrack, an Ampex shareholder (as well as the mother of plaintiffs' counsel, and now plaintiff,[3] Leonard Barrack). It was filed in the wake of an announcement by Ampex that it expected to incur a loss of approximately $40,000,000 in its fiscal 1972 (ending April 30, 1972). The company subsequently announced that its loss would be in the range of $80-$90 million— which it was ($86,000,000)— and the complaint was thereafter amended to cover the entire period through August 3, 1972 when the company announced, in its annual report, that Touche Ross had withdrawn its certification of the Company's 1971 financial statements because of uncertainty as to when certain losses had actually occurred.[4]

In their amended complaint, plaintiffs seek damages for themselves and the alleged class under the implied civil remedies of § 10b and Rule 10b-5 (Count I), as well as under the express provisions of §§ 13(a) and 18(a) of the 1934 Act [15 U.S.C. §§ 78m, 78r] (Count II).[5]

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[3]After the action commenced, Mrs. Barrack died. Pursuant to Rule 25, F. R. Civ. P., her co-executors—Leonard Barrack and his two sisters—were substituted as parties plaintiff.

Several other Ampex investors were subsequently permitted to intervene in the action as plaintiffs.

[4]Although it is now settled that the probability of plaintiffs' success on the merits is irrelevant to class certification (*Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 [1974]), defendants expect to prove that the losses suffered were attributable principally to rapidly changing business conditions in, *e.g.*, the pre-recorded tape and professional audio-video equipment industries (in which Ampex was a major force) and that the defendants acted reasonably and promptly both in determining the extent of the potential loss and in announcing it to the public.

[5]Shortly after its commencement the *Barrack* action was transferred to the Northern District of California by stipulation under 28 U.S.C. § 1404. It was thereafter consolidated, for pretrial purposes, with several other similar cases also pending in the Northern District.

(b) *Class Action Proceedings: District Court.* On April 11, 1972, plaintiffs initially moved for class certification of Counts I and II relying solely upon their complaint and a supporting memorandum. No action was taken on that motion until March 8, 1973 when an amended motion was filed, again without any supporting evidentiary material. Defendants replied to the amended motion by filing briefs and several affidavits directed to the class issue.

On April 11, 1974, the court entered an Order certifying a class under Rule 23(b)(3) with respect to plaintiffs' Rule 10b-5 claim (Count I). The class was defined as "all . . . purchasers of Ampex securities between May 2, 1970 and August 3, 1972." (App. B, p. 47).[6]

Motions for reconsideration of the class order were filed by certain of the defendants (including Messrs. Roberts and Buchan) on April 23, 1974. While those motions were pending, all defendants filed notices of appeal from the initial class action ruling under 28 U.S.C. § 1291. App. A, p. 4. On June 28, 1974, the motions for reconsideration were heard and denied. However, at the hearing on the reconsideration requests, Judge Spencer Williams stated his desire that the Court of Appeals consider the correctness of the class order on interlocutory appeal. Therefore, and in view of the uncertainty concerning a § 1291 appeal from a class certification order, the court *sua sponte* certified its order for § 1292(b) review. A petition for such review was thereafter filed by defendants Roberts and Buchan (as well as by defendants Blackie *et al.*) and was granted by the Court of Appeals on August 5, 1974. App. A, p. 4.

(c) *Class Action Proceedings: Court of Appeals.* On September 25, 1975, the Ninth Circuit affirmed the District

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[6]Plaintiffs' motion for class certification was denied as to Count II on the ground that, in contrast to the judge-made requirements of Rule 10b-5, the *express* liability provisions of the 1934 Act require proof of subjective reliance by each investor—a circumstance which the court conceded was incompatible with class treatment (App. B, p. 40 (n. 7); see *infra* at 24).

Court's class certification order in all respects. *Blackie* v. *Barrack*, 524 F.2d 891 (9th Cir. 1975) (hereinafter referred to as "*Ampex*"). The court held:

(1) That despite the length of the class period, the disparate character of the alleged misrepresentations and the large number of documents in issue, predominating common questions existed in view of the class's "common interest in determining whether [defendants'] course of conduct [was] in its broad outlines actionable . . ." (App. A, p. 19);

(2) That "reliance" in an "open market" case (i.e., the typical class action situation) is "presumed" from the materiality of the misrepresentations "without direct proof of reliance" (App. A, p. 27)—the presumption being, for all intents, conclusive (compare App. A, pp. 28-29); and

(3) That there is no significant conflict between purchasers at different times throughout the class period (or even between persons who both purchased and resold during the class period) since the seemingly disparate interests of these class members are reconciled (i) by abandoning the usual "out of pocket" measure of damages in 10b-5 cases and (ii) by the assumed fact that "it [would] be in the interests of each class member to maximize the inflation from [the misrepresentations] at every point in the class period both to demonstrate the *sine qua non*—liability—and to maximize his own potential damages." (App. A, p. 34).[7]

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[7]The court also held, in a prior portion of its opinion, that class certification orders are not appealable as of right under 28 U.S.C. § 1291, App. A, pp. 5-14. Although that holding conflicts, at least to some extent, with decisions in the Second Circuit (*e.g.*, *Herbst* v. *ITT*, 495 F.2d 1308 [2d Cir. 1974]) and is an open issue in this Court (see *Eisen* v. *Carlisle & Jacquelin*, *supra*), *certiorari* is not sought on that ground by these petitioners. However, petitioners do believe that the issue is an important one, and would urge that it be considered in the event the writ is granted. See Petition of Touche Ross & Co. for *certiorari*, No. 75-.....

Perhaps more important than these specific holdings are the broad policy statements which underlie them. Under the Ninth Circuit's view, the goal of effectively enforcing the securities laws through class actions requires a liberal construction of the requirements both of the class action rule and Rule 10b-5 itself (see App. A, at, *e.g.*, pp. 20, 28 (n. 22), 29 and 30).[8]

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the decision below is fundamentally at odds with *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975) in its approach to Rule 10b-5 and the policies underlying it. *Certiorari* should also be granted to consider the extent to which reliance remains an issue in 10b-5 litigation—a question suggested, but not resolved, by *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972). Beyond these specific points, the overriding question presented here is how civil Rule 23 is to be applied in securities cases under Rule 10b-5.

Petitioners recognize that virtually every request for review before this Court asserts the significance of its particular issues or facts. We nonetheless submit that few issues are of greater importance or more in need of clarification and guidance from this Court than those presented here. Moreover, since both Rule 23 and Rule 10b-5 are essentially judicial creations, review in this Court is particularly appropriate—as the Court has itself noted. Compare, *e.g.*, *Blue Chip Stamps*, *supra*, at 749 ("We are dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question.").

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[8]A Petition for Rehearing *en banc* was denied by the Court of Appeals on December 16, 1975.

1. The Writ Should Be Granted Because the Decision Below Is Contrary to the Principals of Blue Chip Stamps and Applies Rule 10b-5 in an Improper Manner. Viewed most narrowly, *Blue Chip* and *Ampex* do not present the same issue. *Blue Chip* reversed an earlier decision of the Ninth Circuit (492 F.2d 136 [9th Cir. 1973]) and reaffirmed the so-called "purchaser-seller" doctrine of *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2nd Cir. 1952), whereas *Ampex* affirmed a class certification order that did not involve the purchaser-seller doctrine as such. However, neither *Blue Chip* nor *Ampex* can be adequately understood without regard to the broader analysis which underlies their specific holdings. In each of the cases, policy considerations are neither implicit nor peripheral but furnish the explicit premises of the respective opinions.

It is at this level that the two cases at once come together and diverge. For both cases present policy issues which are largely identical. Yet the resolution of these questions in the two cases differs in fundamental respects. Indeed, unless the Court's opinion in *Blue Stamps* is—contrary to its clear language—restricted to the particular facts of that case, the Ninth Circuit's *Ampex* opinion cannot be reconciled with it and must be vacated if, for no other reason, than because of its failure to follow or even consider this Court's decision in *Blue Chip*.[9]

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[9]In fairness to the Court of Appeals, *Blue Chip Stamps* was decided after *Ampex* had been fully briefed and argued in the Ninth Circuit (although Judge Browning, who wrote the majority opinion in *Blue Chip*, was also on the *Ampex* panel). Nonetheless, whether for that reason or otherwise, *Ampex* not only fails to distinguish *Blue Chip Stamps* but does not even cite it. In view of this seeming failure, an appropriate disposition of the current petition may be simply to vacate *Ampex* and remand it for reconsideration in light of the *Blue Chip* decision.

In *Blue Chip Stamps,* a divided panel of the Ninth Circuit[10] declined to apply the purchaser-seller limitation to the facts there presented. The opinion was premised in large part upon the court's perception that applicable congressional policies require a liberal approach to Rule 10b-5 and the elimination of obstructions to recovery in private actions thereunder. See 492 F.2d at 140-41.

This Court reversed. In so doing it discussed at length —and in language fully applicable here—the policy considerations properly applicable in 10b-5 damage suits.[11]

The Court recognized, first, that (as the Ninth Circuit had noted) Rule 10b-5 is a potentially valuable weapon against securities fraud and, further, that the purchaser-seller limitation is in some senses "an arbitrary restriction which unreasonably prevents some deserving plaintiffs from recovering damages." (421 U.S. at 738). However, the Court also observed that there are countervailing considerations which require the retention of reasonable limits upon the class of persons who may seek damages under the Rule:

> "There has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general . . . .

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[10]The majority consisted of Judges Browning and Choy. Judge Hufstedler dissented.

[11]Petitioners expect Respondents to argue that *Blue Chip Stamps* is factually inapposite and that the lengthy policy discussion therein should be disregarded as mere *dicta.* However, that argument is not supported by the Court's decision. In fact, the opinion expressly notes that since private actions under Rule 10b-5 represent a "judicial oak . . . grown from little more than a legislative acorn" it is "proper [to] consider . . . what may be described as policy considerations when we come to flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance." (421 U. S. at 737).

"We believe that the concern expressed for the danger of vexatious litigation which could result from a widely expanded class of plaintiffs under Rule 10b-5 is founded in something more substantial than the common complaint of the many defendants who would prefer avoiding lawsuits entirely to either settling them or trying them. . . ." (421 U.S. at 739-40).

"While much of the development of the law of deceit has been the elimination of artificial barriers to recovery on just claims, we are not the first court to express concern that the inexorable broadening of the class of plaintiff who may sue in this area of the law will ultimately result in more harm than good. In *Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 174 N.E. 441 (1931), *Chief* Judge Cardozo observed with respect to 'a liability to an indeterminate class': 'The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.' *Id.* at 179-180, 174 N.E. at 444." (421 U.S. at 747-48).

In fact, petitioners submit that a fair reading of the *Blue Chip* opinion as a whole reflects this Court's strong concern for the potential dangers of boundlessly extending the dimensions of 10b-5 litigation without equivalent regard for the practical realities which underlie such suits—realities which are, if anything, even more clearly pertinent to the instant class litigation. In this connection, the Court noted that such "practical factors" were "entitled to a good deal of weight" (421 U.S. at 749) and that it was, at the least, appropriate to consider each side of the ledger in determining the appropriate contours of such litigation. As Justice Powell stated in his concurring opinion:

"If an issue of statutory construction is to be decided on the basis of assuring a federal remedy—in addition

> to state remedies—for every perceived fraud, at least we should strike a balance between the opportunities for fraud presented by the contending views." (421 U.S. at 760)

Notwithstanding these clear pronouncements, *Ampex* is substantially a replay of the Ninth Circuit opinion in *Blue Chip Stamps* in its policy discussion. For although the case purports to address only the application of Rule 23 standards in 10b-5 cases, the opinion cannot, as we have noted, be appraised or understood without reference to its express policy premises, *to wit:* that the judicially implied right of action under Rule 10b-5 must be "flexibly adopted [sic] to the overriding purpose of enforcing the Federal securities laws" (App. A, p. 29); that the "availability of the class action" plays a central role in the enforcement of Rule 10b-5 and that, therefore, both Rule 23 and Rule 10b-5 standards must be "liberally construed" to effectuate those goals even if to do so requires an alteration of substantive (or "procedural") rules and allowance of an "overinclusive" recovery. App. A, p. 29 (n. 22).[12] These considerations are articulated at several critical points in the opinion and serve as its unquestioned foundation.

Even more striking is the total absence from *Ampex* of any reference to the competing "negative" concerns which

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[12]The Ninth Circuit's approach to Rules 10b-5 and 23 is perhaps best highlighted by comparing its treatment of the "merits" of class certification, on the one hand, with its refusal to permit appeal of class certification orders under 28 U.S.C. §1291 on the other. As we note in text, the principal thrust of the Court's "merits" discussion is that class actions are critical to the effectuation of Congressional policy in the securities area and therefore must be liberally allowed. However, when discussing appealability, the court exhibits an uncharacteristically conservative attitude—suggesting at several points that arguments concerning appealability are "properly addressed to Congress." See App. A, pp. 13-14. What is more, even though *Blue Chip Stamps* had explicitly recognized that a case such as the present presents an unusual "danger of vexatiousness" and a "settle-

had furnished a basis of the *Blue Chip Stamps* decision. So far as *Ampex* is concerned, neither 10b-5 litigation nor the certification of a damage class upwards of 100,000 investors offers any potential for encouraging strike suits or extortionate settlements. Yet *Blue Chip* pointedly notes the opposite. See 421 U.S. at 739-49.[13]

It is not only the tenor of the *Ampex* opinion which is contrary to *Blue Chip Stamps*. The specific results reached are in several material respects also at odds with its approach to 10b-5 issues. For example, under *Ampex*, a class action on behalf of any number of purchasers or sellers is almost automatically assured merely by an allegation[14] that defendants were engaged over a period of time in a scheme or course of conduct which misrepresented or inflated the value of the securities in question. It is no impediment that these various alleged misstatements may be only marginally connected (or even totally *unrelated*),[15] that they

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ment value to the plaintiff out of any proportion to [its] prospect of success at trial. . . ." (421 U.S. at 740), the *Ampex* panel was able to find no evidence to justify such concerns. It suggested, further, that the "fairness of the pressure" was in any event a question for Congress to consider. App. A, p. 13.

[13]*Ampex* at several points notes that this Court has urged a liberal construction and application of the securities laws, including Rule 10b-5, citing in particular *Affiliated Ute, supra*, at 151. While that suggestion is obviously not without some support, it inexplicably fails to account for the contrary discussion in *Blue Chip Stamps* which is not only more to the point but more recent. See also 421 U.S. at 747-49, where the Court deals expressly with its earlier policy pronouncements and attempts to put them in perspective, and compare *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook Railroad Co.*, 417 U.S. 703, 716 (n. 13)-717 (1974) and *United Housing Foundation Inc.* v. *Forman*, 421 U.S. 837, 859 (n. 26) (1975).

[14]The court's opinion suggests that the allegations of plaintiffs' complaint must be taken as true upon a class certification motion and that certification should be made without an extensive evidentiary hearing, not infrequently on the basis of the pleadings alone. App. A, p. 16 (n. 17).

[15]See generally App. A at fn. 19 (pp. 21-22) ("[E]ven when misrepresentations are unrelated, class members may share a common question of law or fact. . . .") In this connection, it is interesting

may involve vastly differing sets of underlying facts or that they have appeared in numerous separate documents issued throughout the class period—each of which is the case here.

Consistent with this approach, the opinion below essentially brushes aside the critical requirement that common questions predominate over individual ones, noting that all plaintiffs are joined by a common interest in "determining whether a defendant's course of conduct is in its broad outlines actionable" (App. A, p. 19)—a view which the Court of Appeals predictably supports by reference to "the substantial role that the deterrent effect of class actions plays in accomplishing the objectives of the securities laws." App. A, p. 20.

Similarly, the Ninth Circuit's approach to reliance, or "transaction causation", virtually eliminates it as an issue in 10b-5 litigation. While couched in the language of "presumption", the court in effect makes the presumption of reliance conclusive, as a practical matter, by inviting district courts to restrict or preclude defendants' discovery or rebuttal evidence on the point (App. A at 28-29 (n.22), and by further promising that if these devices do not prove successful in dissuading defendants from asserting their rights, the presumption may be made "conclusive". *Id*; compare *Vlandis* v. *Kline*, 412 U.S. 441 (1973) (irrebutable presumption violates due process).

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that the Ninth Circuit quotes, in support of its "common question" holding, the observation of the Advisory Committee on Rule 23 that "a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action (App. A at 20) without quoting the *immediately succeeding sentence* which notes that, "[o]n the other hand, although having some common core a fraud case may be unsuited for treatment as a class action if there was material variation in the representations or in the kind or degrees of reliance by the persons to whom they were addressed." 39 F.R.D. at 103.

Petitioners argued in the court below that abandoning the reliance requirement as a means of facilitating class suits is not only wrong under Rule 23, but is contrary to 28 U.S.C. § 2072, the so-called "enabling act," which proscribes the alteration of substantive rights through procedural rules. *See Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941). The Ninth Circuit attempts to avoid this concern by suggesting that its reliance standard will be applicable to all "open market actions", individual or class. App. A, p. 29. However, since the obvious genesis of the change is the perceived imperative to uphold class suits in the "open market" situation, it is disingenuous of the Court to suggest that it is fashioning a rule of general applicability. What is more, changing substantive rules for *both* class and non-class cases as a means of facilitating class suits is scarcely responsive to the statutory prohibition of § 2072.

The Ninth Circuit's inexplicable failure to consider *Blue Chip Stamps* is, by itself, an appropriate basis for review. However, even in the absence of the *Blue Chip* decision, petitioners submit that the assumptions of, and the results reached by, *Ampex* are sufficiently extraordinary to merit consideration by this Court.

As pointed out above, *Ampex* is justifiable only as an exercise in judicial policy-making, and the policies which *Ampex* makes are themselves justifiable only if the considerations underlying *Blue Chip Stamps* are somehow irrelevant to the question of class certification, and if class certification orders in 10b-5 cases are to be routinely granted. Yet clearly that is not the case. Not only is the language of *Blue Chip* almost directly applicable, but the concerns it expresses apply with at least equal force to the present litigation.

Moreover, in addition to the factors noted above, it should be recalled that the court here has certified an

immense class against defendants who have not even been accused of self-dealing or profiteering.[16] To the extent that anyone has received "overpayment" for Ampex stock as a result of defendants' asserted misrepresentations, those overpayments were received by sellers of Ampex stock—*a great number of whom are also members of the plaintiff class*—rather than by the defendants.

Thus, what the Ninth Circuit has, in effect, held is that defendants who neither intended to deceive, nor profited from, any alleged misrepresentation may nonetheless be accountable for the difference between the market and the "true" value of 21,000,000 Ampex common shares (as well as $50,000,000 worth of Ampex debentures) purchased during the twenty-seven month class period.

While the Court may, upon review, determine that this *in terrorem* approach to 10b-5 liability is appropriate, the wisdom of such a view is far from clear *a priori*. In the current climate of increasing business complexity and economic crisis, the prospect of being exposed to crushing damage liability in such circumstances will certainly discourage many otherwise qualified businessmen from serving on corporate boards or in related capacities. Whether such a deterrent should be erected through the class action device

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[16]Since the merits of an action are not relevant to class certification, the potential for disproportionately large settlements will frequently turn solely upon the ability of plaintiffs to avoid dismissal or summary judgment. Thus the mere assertion of a class claim will, if *Ampex* stands, be an occasion for substantial payments—the greatest single portion of which will ordinarily go to plaintiffs' counsel. In this connection compare, once again, *Blue Chip*, in which the Court aptly observed:

> "In the field of federal securities laws governing disclosure of information, even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial as long as he may prevent the suit from being resolved against him by dismissal or summary judgment." (421 U.S. at 740).

is an important issue which, we submit, ought to be addressed by this Court.[17]

2. The Writ Should Be Granted Because The Decision Below Improperly Eliminates Reliance As An Issue in Misrepresentation Cases in Order to Uphold Class Actions. *Certiorari* should also be granted to consider whether reliance remains an element of proof in 10b-5 misrepresentation cases. As observed previously, *Ampex* all but eliminates it as an unnecessary obstacle to the maintenance of class actions and, thus, to the enforcement of presumed Congressional policy. See App. A, pp. 25-30.

While our concern with *Ampex's* treatment of reliance is, to a large extent, related to the points discussed above, the issue deserves separate consideration in light of the extraordinary array of conflicting approaches to reliance within and among the Circuits—a confusion which results, in part, from questions left open by this Court's decision in *Affiliated Ute Citizens* v. *United States, supra.*

More particularly, the issues presented here are (1) whether *Affiliated Ute's* apparent holding in respect to nondisclosure cases should be extended to misrepresentation

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[17]This Court has recently reviewed or agreed to consider several cases touching the boundaries of 10b-5 litigation. See, *e.g.*, in addition to *Blue Chip* and *Affiliated Ute*, *TSC Industries, Inc.* v. *Northway, Inc.*, No. 74-1471 (*cert. granted* 10/6/75) ("materiality") and *Ernst & Ernst* v. *Hochfelder*, No. 74-1042 (argued 12/3/75) (accountants' liability; "aider and abetter" liability). However, from a practitioners' viewpoint, none of these cases—important though they be—has the significance of the class-related questions posed here. Class actions are, to use the vernacular, "where it's at" in commercial litigation today. Given the overwhelming importance which Rule 23 has assumed, particularly in the antitrust and securities fields, we respectfully submit that it is unfortunate that this Court has not found an appropriate occasion to consider the Rule's central implications in these areas. Petitioners, of course, hope that this case presents such an occasion. We believe that the opinion below represents a watershed in the development of 10b-5 class litigation and that the importance of the issues raised is sufficient to justify consideration.

actions, and (2) whether it is appropriate to modify the reliance requirement in order to facilitate the maintenance of class actions which would otherwise be impermissible.

As traditionally understood, reliance (which is sometimes referred to as "*transaction* causation") is related to, though distinct from, the separate elements of materiality and *loss* causation (or, simply, "causation"). Whether viewed as a part of plaintiffs' case or, conversely, as a permissible affirmative defense, reliance contemplates a showing that the defendants' alleged misstatements were a cause of the securities transaction which forms the basis of the plaintiff's suit.

Prior to the advent of Rule 23 and the recent proliferation of 10b-5 damage actions thereunder, reliance was an unquestioned element of the plaintiffs' case. See, *e.g., List* v. *Fashion Park,* 340 F.2d 457 (2nd Cir. 1965); *Texas Continental Life Ins. Co.* v. *Dunne,* 307 F.2d 242 (6th Cir. 1962). More recently, however, and largely as a result of efforts to conform 10b-5 cases to the requirements of Rule 23, many courts have sought—and in some instances found—ways to eliminate,[18] ameliorate,[19] delay,[20] or trans-

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[18]*Mader* v. *Armel,* 402 F.2d 158 (6th Cir. 1968) *cert. denied,* 394 U.S. 930 (1969); *Kahan* v. *Rosenstiel,* 424 F.2d 161, 173-74 (3d Cir. 1970) *cert. denied,* 398 U.S. 950 (1970).

[19]*In re Brown Co. Sec. Litigation,* 355 F. Supp. 574, 583 (S.D.N.Y. 1973); *Simon* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* 482 F.2d 880, 884-85 (5th Cir. 1973).

[20]*Green* v. *Wolf,* 406 F.2d 291, 301 (2nd Cir.) *cert. denied* 395 U.S. 977 (1968) (suggesting a bifurcated trial); but *cf. Grad* v. *Memorex Corp.,* 61 F.R.D. 88, 98 (N.D. Cal. 1973) ("Use of the bifurcation method, however, does not resolve what appears to be an inherent conflict between proof of the reliance element of a 10b-5 action and the 'predominance of common issues' requirement of Rule 23(b)(3); it merely *delays* resolution of the problem until a later date.")

fer[21] the burden of satisfying this requirement. See generally, Note, *The Impact of Class Actions on Rule 10b-5,* U. Chi. L. Rev. 337 (1971); *Report and Recommendations of the Special Committee, of the American College of Trial Lawyers on Rule 23,* at p. 18 (1972); Note, *The Reliance Requirement in Private Actions under SEC Rule 10b-5,* 88 Harv. L. Rev. 584, 596(n.65) (1975). As the cases cited in the accompanying notes suggest, the law is in a confused state, and the issue continues to arise with predictable frequency. See 88 *Harv L. Rev.* at 586-87.

As the reliance debate was taking shape in the lower courts, this Court decided *Affiliated Ute,* an opinion which, with due respect, added fuel to the controversy and a further dimension to the confusion.

In *Affiliated Ute,* employees of a defendant bank were specifically charged with the responsibility of advising mixed-blood Indians regarding transactions in securities. These employees utilized their position of trust and confidence to induce the Indians to sell these securities to themselves and their friends, without disclosing the fact that they were in a position to gain financially from the Indians' sales, and that the true value of the Indians' shares in the market was substantially higher than the price to be paid to them.

On these facts, this Court held that there was a quasi-fiduciary relationship between plaintiffs and defendants and, thus, an *affirmative duty of disclosure.* When defendants withheld critical facts from the Indians, who then sold, they violated Rule 10b-5 without regard to proof of actual reliance:

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[21] *Rochez Bros.* v. *Rhoades,* 491 F.2d 402, 410 (3d Cir. 1973); *Chris-Craft Indus.* v. *Piper Aircraft Corp.,* 480 F.2d 341 (2nd Cir.), *cert. denied* 414 U.S. 910, 414 U.S. 924 (1973); *Chelsea Assoc.* v. *Rapanos,* ..... F.2d ....., [1975 CCH Fed. Sec. L. Rep. ¶ 95,374 at pp. 98,868-69] (6th Cir. 1975); *Carras* v. *Burns,* 516 F.2d 251, 257 (4th Cir. 1975).

> "*Under the circumstances of this case,* involving primarily a *failure to disclose,* positive proof of reliance is not a prerequisite to recovery . . . [The] obligation to disclose and [the] withholding of a material fact establish the requisite element of causation in fact." (406 U.S. at 153-54) (emphasis added).

The wake of this decision has been broad. Its currents, however, flow in differing directions. Some courts have concededly read *Affiliated Ute* as an invitation to dispense entirely with the reliance requirement in all 10b-5 cases;[22] others have simply ignored it, treated it as creating a presumption of reliance (thus shifting the burden of proof)[23] or as limited to non-disclosure cases only.[24]

Which of these approaches is most nearly correct ought now to be considered, for the issue not only recurs with regularity but has a tremendous potential impact upon the resolution of 10b-5 cases, particularly in alleged class actions.

Petitioners submit that it cannot, in all fairness, be said that *Affiliated Ute* offers adequate guidance for the resolution of this issue. First, not only is the opinion itself carefully limited by its terms ("under the circumstances of this

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[22]*E.g., Davis* v. *Avco Corp.*, 371 F. Supp. 782, 792 (N.D. Ohio 1974); *Allen Organ Co.* v. *North Am. Rockwell Corp.*, 363 F. Supp. 1117, 1127 (E.D. Pa. 1973); *In re Caesars Palace Securities Litigation*, 360 F. Supp. 366, 399 (S.D.N.Y. 1973)

[23]See note 21, *supra.*

[24]*Titan Group, Inc.* v. *Faggen*, 513 F.2d 234, 238-9 (2nd Cir. 1975); *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228, 238 (2nd Cir. 1974); *Jenkins* v. *Fidelity Bank*, 365 F. Supp. 1391, 1398 (E.D. Pa. 1973); *Taylor* v. *Smith, Barney & Co.*, 358 F. Supp. 892 (D. Utah 1973).

case"), there are obvious distinctions between nondisclosure and misrepresentation cases.[25]

As we view *Affiliated Ute*, a critical element to the Court's holding was the fact that the defendants were under an *affirmative duty* to make known to plaintiffs their conflicting interests in the Indians' sales. Since they failed to discharge that duty by withholding relevant information, they were properly found to have violated Rule 10b-5. Requiring proof of reliance in such circumstances would not only have been logically unrealistic but unnecessary, since it was the responsibility of the defendants to assure that the pertinent information was made known to the plaintiffs.

By contrast, in a misrepresentation case such as *Ampex*, the plaintiff's awareness (or unawareness) of the purportedly misrepresented facts at the time of his transaction is critical. If, for example, a purchaser was entirely unaware of the company's alleged overstatement of income—and thus could not demonstrate reliance thereon in purchasing its stock—he is, under traditional principles, denied recovery. If that rule is now to be changed, by extension of *Affiliated Ute* or otherwise, we submit that the change

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[25]The opinion below suggests that the purported misstatements of Ampex's financial condition "either are *or can be*, cast in omission or non-disclosure terms" (App. A, p. 26, emphasis added)—thus purportedly bringing the case within the literal holding of *Affiliated Ute*. However, that approach is patently disingenuous, as several lower courts have previously recognized. See *Herzfeld* v. *Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112, 127 (S.D.N.Y. 1974); *Lorber* v. *Beebe*, ... F. Supp. ..... [1975 CCH Fed. See L. Rptr. ¶95,363 at 98,817] (S.D.N.Y. 1975) (*opinion modified on other grounds*, February 11, 1976). If accepted, every case could be treated as a non-disclosure action, since the reporting of erroneous information could certainly be said to represent a non-disclosure of the *true* facts. We do not believe that the Rule can fairly be so read.

should be made by this Court upon a full review of the competitive considerations.[26]

Even apart from the uncertainties of *Affiliated Ute* (and the consequent conflict in decisions), petitioners submit that this Court ought to review *Ampex's* treatment of the reliance issue.

As noted briefly above, *Ampex* "eliminates" (App. A, p. 29) the traditional reliance requirement in 10b-5 "open market" cases (whether involving omissions or misrepresentations) in favor of a purported "presumption" based simply upon a showing that the representations were "material".

Once again, this reshaping is accomplished in the name of policy. Indeed, it is in the discussion of reliance that the lower court's approach is most clearly articulated. Thus the opinion notes, for example, that 10b-5 actions "must be and have been flexibly *adapted* to the *overriding purpose* of enforcing the Federal securities laws" (App. A, p. 29; emphasis added). Since requiring positive proof of reliance presents a potential obstacle to class suits,

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[26] *Ampex* suggests that proof of individual reliance should not be required since, if a misstatement is *material* the "market" will rely on it, thereby inflating the price of the company's stock and causing injury to purchasers. Therefore, *Ampex* reasons, reliance should be "presumed" from materiality, subject to the defendant's *supposed* right of rebuttal. App. A, pp. 27-28; compare discussion, *supra* at 14-15.

That approach, however, is semantic sleight of hand and should be so acknowledged. What *Ampex* describes as reliance has traditionally been comprehended by the separate elements of materiality and *loss* causation. Assuming that there has been a material misstatement and consequent price inflation, proof of those facts would establish materiality and causation of economic injury. They would not, however, demonstrate that any particular *transaction* (*i.e.*, purchase of the company's stock) was caused by the misrepresentation. It is that link which has always been provided by reliance. While there may be sufficient reasons for eliminating that requirement or shifting the burden of disproof to defendants, it should at least be done forthrightly rather than through an Alice-In-Wonderland approach to the English language.

Ampex "eliminates" it, thereby "obviating the danger of *subverting the class action* with delaying and harassing tactics." App. A, p. 29 (n. 22) (emphasis added).

However, the court's view of applicable Congressional policy not only contradicts traditionally applicable principles but the expressed legislative intent itself—at least, insofar as that intent can be determined. Proof of reliance was unquestionably contemplated by Congress as an element of private damage actions under the federal securities statutes. In its principal discussion of civil liability under the Securities Exchange Act, the Senate Report noted:

> "Experience with state laws designed to prevent the exploitation of the investor by supervision of the sale of securities has demonstrated the inadequacy of criminal penalties as the sole sanction. Customers are ordinarily reluctant to resort to criminal proceedings, and in the absence of complaints by them, discovery of violations is almost impossible. Furthermore, if an investor has suffered loss by reason of illicit practices, it is equitable that he should be allowed to recover damages from the guilty party. With these considerations in view, the Bill provides that any person who unlawfully manipulates the price of a security, or who *induces transactions* in a security by means of false or misleading statements, or who makes a false or misleading statement in the report of a corporation, shall be liable in damages to those who have bought or sold the security at prices affected by such violation or statement. In such case the burden is on the plaintiff to show the violation or the fact that the statement was false or misleading, *and that he relied thereon to his damage*." S. Rep. 792, 73rd Cong. 2d Sess. (1934) at 12-13 (emphasis added).

This approach was expressly embodied in § 18 of the Act, 15 U.S.C. § 78r, which provides that

> "any person who shall make or cause to be made any statement in any application, report, or document filed

> pursuant to this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of [section 15] of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person *(not knowing that such statement was false or misleading) who, in reliance upon such statement,* shall have purchased or sold a security at a price which was affected by such statement, *for damages caused by such reliance. . . .*" (emphasis added).

Ampex's substantial departure from the legislative scheme not only belies the Ninth Circuit's stated intent to pursue Congressional policy but is, again, directly contrary to *Blue Chip.*

Blue Chip states quite clearly that, whatever speculation may be necessary because of the absence of an express provision for civil damage actions, Rule 10b-5 should not be interpreted or expanded in a manner inconsistent with the express liability provisions of the securities laws:

> "It would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action." (421 U.S. at 736).

The anomaly to which *Blue Chip* adverts is dramatically underscored in *Ampex* by the fact that plaintiffs' additional attempt to bring a class action under §§ 13 and 18 (Count II) was denied by the district court precisely for the reason that § 18 "requires by its very language individual, subjective reliance by those seeking relief thereunder [and that] requiring proof of individual reliance for each class member would necessarily defeat commonness of issues of law or fact and preclude a class action on that count." App. B at 42 (n. 7).

CONCLUSION

Ampex proceeds from the premise that class suits must be facilitated in every manner because they further the enforcement and deterrent effect of the securities laws. We quite agree that the *pro forma* certification of massive classes, as in *Ampex*, will doubtless produce an ever-increasing flow of such cases and result in not insubstantial settlements to plaintiffs (and their lawyers). However, as *Blue Chip* aptly observes the proliferation, as well as the expanding boundaries, of this type of litigation is not without its hazards—both to defendants and to the judicial process. What is more, the law not infrequently recognizes higher concerns than mere expedience. Use of improperly coerced confessions would doubtless ease the burden of gaining criminal convictions, yet we preclude them out of concern that innocent as well as guilty people may otherwise suffer and because of the paramount importance attached to procedural and substantive fairness.

So here, the Court of Appeals has, in the name of policy, largely dispensed with the requirements of Rule 23 in 10b-5 cases. In so doing, it not only ignores the interests and rights of defendants, but also a recent opinion of this Court.

Accordingly, and for the reasons set forth above, this Petition for a writ of Certiorari should be granted.

Dated: March 11, 1976

Respectfully submitted,

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APPENDIX A

OPINION OF THE COURT OF APPEALS

William BLACKIE et al.,
Defendants-Appellants,
v.
Leonard BARRACK et al.,
Plaintiffs-Appellees.

AMPEX CORPORATION,
Defendant-Appellant,
v.
Benjamin L. KUSHNER,
Plaintiff-Appellee.

William E. ROBERTS and John Buchan, Defendants-Appellants,
v.
Benjamin L. KUSHNER et al.,
Plaintiffs-Appellees.

TOUCHE ROSS & CO.,
Defendant-Appellant,
v.
Leonard BARRACK et al.,
Plaintiffs-Appellees.

William E. ROBERTS et al.,
Defendants-Appellants,
v.
Leonard BARRACK et al.,
Plaintiffs-Appellees.

Nos. 74-2141, 74-2341, 74-2167, 74-2466 and 74-2648.
United States Court of Appeals, Ninth Circuit.
Sept. 25, 1975.

Arthur R. Albrecht (argued), McCutchen, Doyle, Brown & Enersen, San Francisco, Cal. for defendants-appellants in No. 74-2141.

David Berger (argued), Philadelphia, Pa., for plaintiff-appellees in No. 74-2141.

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Stephen V. Bomse (argued), Heller, Ehrman, White & McAuliffe, San Francisco, Cal., for defendants-appellants in No. 74-2341.

Thomas Elke (argued), San Francisco, Cal., for plaintiff-appellee in Nos. 74-2341 and 74-2648.

William W. Godward (argued), Cooley, Godward, Castro, Huddleson & Tatum, San Francisco, Cal., for defendant-appellant in No. 74-2466.

Melvyn I. Weiss (argued), Millberg & Weiss, New York City, for plaintiff-appellee in Nos. 74-2466 and 74-2648.

Thomas A. H. Hartwell (argued), Cooley, Godward, Castro, Huddleson & Tatum, San Francisco, Cal., for plaintiff-appellee in No. 74-2648.

OPINION

Before TUTTLE,* KOELSCH and BROWNING, Circuit Judges.

*The Honorable Elbert P. Tuttle, United States Court of Appeals Senior Circuit Judge for the Fifth Circuit, sitting by designation. KOELSCH, Circuit Judge:

These are appeals from an order conditionally certifying a class in consolidated actions for violation of Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240. 10(b)-5.

The litigation is a product of the financial troubles of Ampex Corporation. The annual report issued May 2, 1970,

for fiscal 1970, reported a profit of $12 million. By January 1972, the company was predicting an estimated $40 million loss for fiscal 1972 (ending April 30, 1972). Two months later the company disclosed the loss would be much larger, in the $80 to $90 million range; finally, in the annual report for fiscal 1972, filed August 3, 1972, the company reported a loss of $90 million, and the company's independent auditors withdrew certification of the 1971 financial statements, and declined to certify those for 1972, because of doubts that the loss reported for 1972 was in fact suffered in that year.

Several suits were filed following the 1972 disclosures of Ampex's losses. They were consolidated for pre-trial purposes. The named plaintiffs in the various complaints involved in these appeals[1] purchased Ampex securities during the 27 month period between the release of the 1970 and 1972 annual reports, and seek to represent all purchasers of Ampex securities during the period. The corporation, its principal officers during the period,[2] and the company's independent auditor are named as defendants. The gravamen of all the claims is the misrepresentation by reason of annual and interim reports, press releases and SEC filings of the financial condition of Ampex from the date of the 1970 report until the true condition was disclosed by the announcement of losses in August of 1972.

The plaintiffs moved for class certification shortly after filing their complaints in 1972; after extensive briefing and argument the district judge entered an order on April 11, 1974, conditionally certifying as a class all those who purchased Ampex securities during the 27 month period. The

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[1]The lead action here, the so-called *Molder* action, was originally field in the Eastern District of Pennsylvania in January of 1972, and transferred to the Northern District of California, where it was consolidated for pretrial with seven other actions. Twelve parties have been allowed to intervene as plaintiffs in the *Molder* action.

[2]Appellants Roberts and Buchan terminated their relationship with Ampex during the class period; the remaining individual defendants were in office throughout the period.

defendants filed notices of appeal from the order of certification on May 9 and 10, 1974.[3]

Additionally, the district judge, in an order entered July 1, 1974, denying a motion made by defendants Roberts and Buchan, and defendants Blackie, *et al.*, for reconsideration of the class certification, permitted those defendants to seek an interlocutory appeal from that order under 28 U.S.C. § 1292(b).[4] We granted the petition for interlocutory review.[5] That appeal was designated No. 74-2648, and consolidated with the direct appeals.

In December of 1974, plaintiffs filed a motion to dismiss the various appeals—the purportedly direct appeals on the ground that the certification order is not appealable under 28 U.S.C. § 1291, and the § 1292(b) appeal on the ground that it has been prosecuted in a dilatory manner.

The appeals having now been heard and submitted, we face three issues: 1) whether the order certifying the class is a final order appealable under § 1291; 2) whether the interlocutory appeal should be dismissed; and (if any of the appeals are properly before us) 3) whether the district court order certifying the class was proper under the standards set out in Fed.R.Civ. P.23(a) and (b)(3). To summarize our decision, we hold the certification order non-

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[3]The direct appeals are designated Nos. 74-2141, 74-2341, 74-2167, and 74-2466.

[4]The district court did not grant permission to appellants Touche and Ampex to seek interlocutory review, as they had not joined in the motion for reconsideration filed before the filing of their notices of appeal. The court assumed that the filing of the notices divested him of jurisdiction over those defendants. We reject Ampex' argument that it is here under § 1292(b) by virtue of its codefendant's interlocutory appeal and its own filing of a notice of appeal under Fed.R.App.P. 4. The taking of an interlocutory appeal requires a discretionary judgment by both the district court and court of appeals—that judgment is exercised with respect to particular parties. As a result, Fed.R.App.P. 5 does not provide, as does Rule 4, for parties to join in others' appeals.

[5]Thus, whether the standards for certification of such an appeal set out in § 1292(b) were met has been decided, and is not now before us.

appealable and dismiss the direct appeals; we deny the motion to dismiss the § 1292(b) certified appeals; and, on the merits, hold that the suit may properly be maintained as a class action.

I. Appealability under § 1291 of an order granting class action status.

The courts of appeals have jurisdiction over appeals of right under 28 U.S.C. § 1291 only from "final decisions" of the district courts. The statutory limitation is the product of a two-fold policy judgment about judicial administration which was written into the first Judiciary Act and adhered to ever since. *See Cobbledick v. United States,* 309 U.S. 323, 324-325, 60 S.Ct. 540, 84 L.Ed. 783 (1940). The requirement saves judicial time by eliminating review of rulings adverse to an eventually successful litigant. But more importantly, the uniform imposition of finality as a condition of review improves the quality of justice administered by the judicial system. On balance, the rule shortens the time needed for resolution of controversies, saving litigants both time and money; "[requiring finality avoids] the obstruction to just claims that would come from permitting the harrassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." *Cobbledick, supra* at 325, 60 S.Ct. at 541. In short, the rule is one of the primary bars against Bleak House Judicial administration;[6]

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[6] A system of judicial administration, fortunately unknown in this country,

> "which has its ruined suitor, with his slipshod heels and threadbare dress, borrowing and begging through the round of every man's acquaintance; which gives to monied might, the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart; that there is not an honorable man among its practitioners who would not give—who does not often give—the warning, 'Suffer any wrong that can be done you, rather than come here!' "

Dickens, Bleak House, quoted in The World of Law—I, The Law *in* Literature 42 (E. London ed. 1960).

as such, its rationale applies equally to an order certifying a class.

Nevertheless, in some circumstances deferring an appeal practically operates to deny effective review, as the right threatened by an adverse ruling will have been lost in the interim before final disposition of the other aspects of the controversy. The Court therefore has given the § 1291 final decision requirement a "practical rather than a technical construction," *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 548, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528 (1949), and allowed interlocutory appeal from a "small class [of orders] which finally determine claims of right separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, at 546, 69 S.Ct. at 1225. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170-172, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (*Eisen IV*); Note, *Class Action Certification Orders: An Argument for the Defendant's Right to Appeal*, 42 Geo. Wash.L.Rev. 621, 625-628 (1974). Two of the three circuits which have faced the issue have nevertheless held a class certification order non-appealable under *Cohen*. *Thill Securities Corp. v. New York Stock Exchange*, 469 F.2d 14 (7th Cir. 1972); *Walsh v. City of Detroit*, 412 F.2d 226 (6th Cir. 1969). *Accord*, 9 J. Moore, Federal Practice ¶110.13[9], at 184-187 (2d ed. 1970).

The Second Circuit, however, has permitted appeal in certain limited circumstances. In *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035, 87 S.Ct. 1487, 18 L.Ed.2d 598 (1967) (*Eisen I*), that court recognized that an order denying class action status effectively sounded the "death knell" of the plaintiff's suit. As "no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen," the individual claim could not be adjudicated, and as a practical

matter the class question could never be appealed. The court therefore concluded the order was appealable under *Cohen.* We have adopted the death knell doctrine. *Falk v. Dempsey-Tegeler & Co., Inc.*, 472 F.2d 142 (9th Cir. 1972); *Weingartner v. Union Oil Company of California*, 431 F.2d 26 (9th Cir. 1970).

From that springboard the Second Circuit developed a "reverse death knell" doctrine with respect to a defendant and his rights to foreclose an ostensible class suit against him. Influenced by the suggestion that it consider a rule which would "afford equality of treatment as between plaintiffs and defendants" (*Korn v. Franchard Corp.*, 443 F.2d 1301, 1307 (2d Cir. 1971) (Friendly, J., concurring)), a panel of the circuit held in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1007 n. 1 (2d Cir. 1973) *(Eisen III)*, that defendants could appeal an order granting class status under three specified conditions. As explicated in *Herbst v. International Telephone and Telegraph Corp.*, 495 F.2d 1308, 1312 (2d Cir. 1974), such an order is appealable when the class determination is " 'fundamental to the further conduct of the case' " (*i.e.*, when, were the class determination reversed, the individual claims presented would be too small to continue the suit, thus effectively terminating it—the reverse death knell situation);[7] when the *order* is " 'separable from the merits;' " and when it will result in " 'irreparable harm to the defendant in terms of time and money spent in defending a huge class action.' " *Herbst*, at 1312, quoting from *Eisen III*, at 1007 n. 1. We are asked, the issue being novel in this circuit, to adopt the Second Circuit's position.[8]

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[7] *See General Motors Corp. v. City of New York*, 501 F.2d 639, 645 (2d Cir. 1974); *Kohn v. Royall, Koegal and Wells*, 496 F.2d 1094, 1099 (2d Cir. 1974). *But see General Motors Corp., supra*, at 656-657.

[8] Wholly aside from our disagreement with the Second Circuit rule, we doubt that the order involved here would be appealable under that rule. Including intervenors, the named plaintiffs purchased 10,000 shares during the class period and damages would appear to be such that the action would proceed were the order

We decline to do so, because we believe that the Second Circuit's rule impermissibly[9] disregards the conditions placed on appealability by *Cohen*. The rule of finality is a statutorily imposed restraint on our jurisdiction; as noted, it imposes a legislative judgment that on balance time and money will be saved if appeal is deferred until the conclusion of a suit. We are not free to disregard that judgment; exceptions to uniform application undermine the rule's purpose by fostering litigation about whether an order is exceptional and appealable. And with the proliferation of narrow and peculiar exceptions, the more doubtful and difficult it becomes to determine appealability, at district and appellate court levels, increasingly inviting supposedly foreclosed interlocutory litigation.

In this view and while recognizing that it is nevertheless such an exception, we think the *Cohen* "collateral order" standards should be restrictively construed. The *Cohen* rule is an effort to prevent the inevitable injustices to litigants which result from application of a prophylactic rule which operates "on balance," but only in those limited situations where it can be accomplished with a minimum intrusion on the statutory policy. Thus, *Cohen* requires not only

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reversed. Thus, criteria 1 may not be satified. *See, e.g., Falk, supra* (holding individual claim of $14,125 too large to invoke death knell doctrine); *Shayne v. Madison Square Garden Corp.*, 491 F.2d 397 (2d Cir. 1974) (individual claim of $7,482 too large); *Milberg v. Western Pacific R. R.*, 443 F.2d 1301 (2d Cir. 1971) ($8,500 claim too large). Moreover, in this case the second criteria is probably not met either. *See Kohn, supra,* at 1099; *General Motors Corp., supra,* at 646, 659.

[9]We recognize that it is not altogether certain that the *Cohen* standards represent the outer parameters of appealability, in light of the Court's admonition in that case to give the final decision rule a practical rather than technical construction, and its later observation in *Eisen IV*, 417 U.S. at 170, 94 S.Ct. at 2149, that "[n]o verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future." However, we think those standards were so intended and should be so read, for the same reasons that we think the *Cohen* exception was intended to be narrowly construed, which we set out below.

that denial of immediate review result in loss of a right which cannot be sustained by later review, but also that the order appealed from be final and collateral. Thus, even when an injustice may result, immediate review is available only when the appellate court will not be required to duplicate efforts entailed in a later review on the merits, or to review a decision whose tentative nature will render the appellate court's decision fruitless later in the lawsuit.

We are clear that a class certification order does not fall within *Cohen*. The finality condition is not met, as such an order is not a final determination of the propriety of a class. Under Fed.R.Civ.P.23(c)(1), a class must be certified as soon as practicable after commencement of the action, and is made conditional and subject to alteration, to the creation of sub-classes, Rule 23(c)(4)(B), or indeed to decertification as the suit progresses and newly discovered facts warrant.[10] Nor is the class issue separable from the merits in all cases (including this one). The common questions, typicality, conflicts and adequacy of representation, Fed.R.Civ.P.23(a), and predominance tests, Fed.R. Civ.P.23(b)(3), are determinations (unlike, for example, the notice question involved in *Eisen IV*) which may require review of the same facts and the same law presented by review of the merits.[11]

Nor, for that matter, does the order threaten the defendant with any irreparable harm cognizable under *Cohen*. The defendant does not lose any legal rights or

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[10]"But we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question." *Cohen*, at 547, 69 S.Ct. at 1226.

[11]*See Kohn, supra*, at 1099; *General Motors Corp., supra*, at 659. In fact, as a ruling on class certification must be made soon after commencement of the action, the facts governing the class determination will inevitably be less clear than after the case has gone to judgment.

entitlement in the interim between certification and appeal —appeal after the litigation fully protects from a judgment for an improper class. *See* Geo.Wash. Note, *supra*, at 628-630.

The Second Circuit found the requisite injury in the increased, and generally irrecoverable, costs of defending the class action. With deference, we disagree. The final decision rule itself often increases the time and cost of litigation. Denial of immediate review from orders denying motions to dismiss, Fed.R.Civ.P. 12(b)(6), or for summary judgment, Fed.R.Civ.P. 56, may subject a defendant in particular cases to defense cost equivalent to those incurred in defending a class action. Geo.Wash. Note, *supra*, at 629-630; *Kohn v. Royall, Koegel & Wells*, 496 F.2d 1094, 1098-1099 (2d Cir. 1974). Such litigants must bear those costs because of the legislative judgment that a final decision rule will most benefit all litigants, statutorily foreclosing reliance on litigation costs as a justification for departure from the final decision rule.[12]

It strikes us that the Second Circuit rule is the product of three policy considerations, urged on us here as well, which we conclude are insufficient to justify departure from the Cohen gloss on the rule.

The first is that litigation costs will be reduced by allowing appeal and thus avoiding the substantial costs of litigating an improperly certified class. While perhaps true in a particular suit, we suspect that the savings envisioned may well prove illusory. Applied to all class actions, the Second Circuit's rule saves time and money only when the appellate court determines the particular class certification order is appealable, when the order would not have been

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[12]Neither *Cohen* nor *Eisen IV* support the Second Circuit in this regard. In both cases the defendant was threatened with costs which the applicable statute placed on the plaintiff. In neither case did the Court rely on general litigation expense to justify appealability.

otherwise appealable under the narrower *Cohen* exception, when the district judge would have refused to certify a § 1292(b) appeal, where the district judge would not later decertify the class, and where, on the merits, the order is reversed. Even then, later developments in the suit may lead to reinstatement of the class. To be balanced against savings is the loss of time and money resulting from appeal in which the order is held non-appealable, or the order is affirmed. Neither we nor (we suggest) the Second Circuit have any way of striking that balance. We can only speculate concerning the various costs, time spans, and percentages which must necessarily be appraised to determine whether the Second Circuit's exception could pay its way; it is ultimately a question which is best suited to legislative investigation and judgment.

Moreover, we would suggest that the number of suits in which a rule of appealability would be worthwhile may be relatively small. The standard of review is abuse of discretion. A number of the criteria set out in Rule 23 relate to matters, such as manageability, adequacy of representation, feasibility of joinder, superiority to other available methods of adjudication, and the like, which are much more within the knowledge of the district court in touch with the litigation than in ours; our review is unlikely to add any superior wisdom, or to reverse on those grounds. In those cases which turn on a question of law, the district judge may certify an interlocutory appeal.[13] The number of cases in which massive litigation costs are threatened, in which a district

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[13]Generally an order granting class action status does not involve a controlling question of law when entered because it has no significant effect on the litigation until issues not pertaining to the personal claims of the class representative have to be decided. Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv.L.Rev. 607, 630-631 n. 97 (1975).

judge declines to certify an appeal, and which thereafter results in reversal of the class certification, may prove small indeed.

The second consideration is that, because the "death knell" doctrine allows plaintiffs to appeal order denying class status, parity of treatment requires that defendants be allowed to appeal orders granting such status. We disagree. Precisely the same disparity exists between plaintiffs and defendants with regard to summary judgment or motion to dismiss orders. So long as they are differently situated in a manner relevant to the purposes of the final decision rule, plaintiffs and defendants may be treated differently. Suffice it here to say that they are differently situated with respect to the finality of the class order—an order denying in the "death knell" situation effectively terminates the suit and precludes presentation of the merits; an order granting does not end the suit, or preclude presentation of the defense, and is subject to reevaluation as well. *See* Geo. Wash. Note, *supra,* at 631-632.

The final consideration relied on by the Second Circuit, *see Herbst, supra,* at 1313, strenuously urged here, is that a class certification order in a large-class, small-claim class action threatens such ruinous liability that the defendant inevitably must settle even frivolous claims, thereby effectively precluding review of the crucial class certification order unless interlocutory review is allowed. Again, we are unpersuaded. In large part the argument is an attack on the decision reflected in Rule 23 to allow integration of numerous small individual claims into a single powerful unit, rather than to an attack peculiarly germane to the operation of the final decision rule in the class action context. Precisely the same power to coerce a settlement (and defeat review of potentially erroneous previous orders) is wielded by any plaintiff with a substantial claim—that fact alone does not

generally confer appealability on an order which effectively requires a defense to a large claim. The fairness of the pressure—*i.e.*, the sociological merits of the small claims class action—is not a question for us to decide. The fact is that Congress, by authorizing and approving Rule 23(b)(3), created a vehicle to put small claimants in an economically feasible litigating posture. In that light, we doubt the propriety of an attendant judicial alteration of the final decision rule which immediately (and uniquely) subjects redress of class plaintiffs' claims to the delay and cost of an appeal.

We recognize, of course, that it is the class certification order itself which, if erroneous, creates the improper coercive effect. That is a distinction without a difference unless class certification orders have unique effects specially implicating the policy of the final decision rule. It may well be that a higher percentage of class certification orders are erroneous than others which subject a defendant to the coercion of a large potential liability; or that a higher percentage of frivolous claims are presented in class actions than in others; or that the magnitude of the potential liability in class actions is leading to settlement of more frivolous claims and abandonment of more meritorious appeals, than occurs in other litigation. If such is not the case, there is no reason to treat a class certification order differently than any other interlocutory order. If so, an exception may or may not be justified.[14]

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[14]We note that the supposed *in terrorem* effect of the class certification will persist despite a right of immediate appeal—the claim may be frivolous and the class proper. Immediate appeal will eliminate only the improperly certified coercive class action, at the expense of both frivolous and non-frivolous, property [sic] certified classes. It may well be better to attack the "blackmail" problem directly with appropriate safeguards rather than collaterally undermining the final decision rule.

In either event, however, the argument is again properly addressed to Congress. We have no reliable knowledge,[15] and no good means of acquiring any, about the present nature and number of class action settlements, and of how that experience compares with individual lawsuits of the same type, or pressing claims of similar magnitude. Thus, we have no means of deciding whether the present hue and cry of "blackmail" in fact reflects an abnormally high incidence of unfairly coerced settlements, or is rather the pained outcry of defendants whose previously advantaged litigating position has been undermined, and who must now confront small claimants (who have been given the capacity to exert pressure proportionate to the magnitude of the total injury occasioned by defendant's alleged violation of the law) on more equal grounds. Without such knowledge, there is no justification for departure from the "final decision" rule in this context, and we decline to do so.

Consequently, the § 1291 appeals designated Nos. 74-2141, 74-2167, 74-2341 and 74-2466 are dismissed.

II. *The § 1292(b) interlocutory appeals.*

We deny the motion to dismiss the § 1292(b) appeals.

The prosecution of these appeals has not been a model of diligence. Defendants were granted an extension of the

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[15]Both sides have cited extensive commentary, by courts and critics alike, on the supposed *in terrorem effect* of class actions. Almost inevitably those opinions are supported by highly inconclusive, or no, empirical evidence; most of the debate is founded on speculation, primarily dictated by the writer's personal experience and feelings for or against class actions. The empirical evidence on the subject is very limited, and not particularly helpful because it provides no basis for comparison of class actions with other suits. For what it is worth, however, the empirical evidence indicates that a relatively high proportion of class actions are not settled, but disposed of in defendant's favor on preliminary motions. *See* Committee on Commerce, United States Senate, *Class Action Study*, 93d Cong., 2d Sess. (1974), Committee Print at 9-10. On the basis of the evidence before it, the Commerce Committee concluded that the class action was not a particularly effective vehicle for coercing settlements.

time to transmit the record, and three extensions in the briefing schedule. Some of those delays could have been avoided; while the issues involved are somewhat complex, we note that much of the material in the appellate briefs was presented to the trial court, and that the lawyers did not start from scratch here.

However, the motion to dismiss is addressed to our discretion, and we think dismissal is not mandated in this case. From the somewhat conflicting representations before us it appears that appellees may have agreed to the extensions, although that acquiescence may have been induced by a now disclaimed representation that plaintiffs could continue with discovery while the case was on appeal. Because the record is hazy, because we have granted the extensions, and because the issues have now been briefed and argued and are ripe for decision, we think the preferable course is for us to decide the appeal and provide guidance to the trial court. However, we do note that one purpose of interlocutory appeals is to hasten the conclusion of a lawsuit, that briefing extensions defeat that purpose, and that in appropriate circumstances we can deny unwarranted extensions and dismiss appeals to prevent an interlocutory appeal from being misused as a dilatory tactic.

We turn to the merits of defendants' Buchan and Roberts, and Blackie, et al., § 1292(b) appeals.

III. *Compliance with the Requirements of Fed.R.Civ.P. 23(a)* and *(b)(3)*.

A. The court's approach to class certification.

As a preliminary matter, we face the contention that the district judge certified the class in an inappropriate manner. Relying on our opinion in *In re Hotel Telephone Charges,* 500 F.2d 86, 90 (9th Cir. 1974) defendants argue that he improperly engaged in speculation when determining whether a common question exists, and whether conflicts make class

representation inadequate, rather than determining, before certifying the class, that the requirements of the Rule were in fact met. We disagree.

From a thorough review of the district judge's opinion, we think it apparent that he analyzed the allegations of the complaint[16] and the other material before him (material sufficient to form a reasonable judgment on each requirement), considered the nature and range of proof necessary to establish those allegations, determined as best he was able the future course of the litigation, and then determined that the requirements were met at that time.[17] That is all that is required.

Defendants misconceive the showing required to establish a class under *Hotel Telephone Charges*. We indicated there that the judge may not conditionally certify an improper class on the basis of a speculative possibility that it may later meet the requirements. 500 F.2d at 90. However, neither the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining

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[16]In large part appellants' attack on the district judge's approach is a reiteration of their disagreement with his legal conclusions. The speculative language seized upon in the opinion simply conditions the conclusion that a common question exists on plaintiffs' proof of the allegations—*i.e.*, if plaintiffs prove their allegation of X, X will be a question of fact or law common to the class. Such speculation is entirely proper and necessary. Likewise, the court ruled that any conflicts at present did not appear to defeat adequacy of representation, but that if any unforeseen difficulties arose, they could be cured by sub-classes—again a proper application of the Rule.

[17]The court is bound to take the substantive allegations of the complaint as true, thus necessarily making the class order speculative in the sense that the plaintiff may be altogether unable to prove his allegations. While the court may not put the plaintiff to preliminary proof of his claim, it does require sufficient information to form a reasonable judgment. Lacking that, the court may request the parties to supplement the pleadings with sufficient material to allow an informed judgment on each of the Rule's requirements.

to certify a class which apparently satisfies the Rule. The district judge is required by Fed.R.Civ.P. 23(c)(1) to determine "as soon as practicable after the commencement of an action brought as a class action . . . whether it is to be so maintained." The Court made clear in *Eisen IV* that that determination does not permit or require a preliminary inquiry into the merits, 417 U.S. at 177-178, 69 S.Ct. 1221; thus the district judge is necessarily bound to some degree of speculation by the uncertain state of the record on which he must rule. An extensive evidentiary showing of the sort requested by defendants is not required. So long as he has sufficient material before him to determine the nature of the allegations, and rule on compliance with the Rule's requirements, and he bases his ruling on that material, his approach cannot be faulted because plaintiffs' proof may fail at trial. Of course, whether he applied correct legal principles in making the ruling, and whether the ruling was within the permissible boundaries of the discretion vested in him, is another question, to which we now turn.

B. *The merits of class certification.*

Defendants question this suit's compliance with each of the various requirements of Rule 23(a) and (b)(3)[18] except

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[18]Rule 23 provides in part:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

"(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

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"(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions

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numerosity (understandably, as it appears that the class period of 27 months will encompass the purchasers involved in about 120,000 transactions involving some 21,000,000 shares). However, all of defendants' contentions can be resolved by addressing 3 underlying questions: 1) whether a common question of law or fact unites the class; 2) whether direct individual proof of subjective reliance by each class member is necessary to establish 10b-5 liability in this situation; and 3) whether proof of liability or damages will create conflicts among class members and with named plaintiffs sufficient to make representation inadequate? We turn to the first issue.

1. *Common questions of law or fact.*

The class certified runs from the date Ampex issued its 1970 annual report until the company released its 1972 report 27 months later. Plaintiffs' complaint alleges that the price of the company's stock was artificially inflated because:

> "the annual reports of Ampex for fiscal years 1970 and 1971, various interim reports, press releases and other documents (a) overstated earnings, (b) overstated the value of inventories and other assets, (c) buried expense items and other costs incurred for research and development in inventory, (d) misrepresented the companies' current ratio, (e) failed to establish adequate reserves for receivables, (f) failed to write off certain

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affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

> assets, (g) failed to account for the proposed discontinuation of certain product lines, (h) misrepresented Ampex's prospects for future earnings."

The plaintiffs estimate that there are some 45 documents issued during the period containing the financial reporting complained of, including two annual reports, six quarterly reports, and various press releases and SEC filings.

Because the alleged misrepresentations are contained in a number of different documents, each pertaining to a different period of Ampex's operation, the defendants argue that purchasers throughout the class period do not present common issues of law or fact. They reason that proof of 10b-5 liability will require inspection of the underlying set of facts to determine the falsity of the impression given by any particular accounting item presented; that the underlying facts fluctuate as the business operates (*i.e.*, inventory is bought and sold, accounts are paid off and created); thus, proof of the actionability of a current accounting representation or omission will apply only to those who purchased while a financial report was current; from which they conclude no common question is presented and a class is improper.

We disagree. The overwhelming weight of authority holds that repeated misrepresentations of the sort alleged here satisfy the "common question" requirement. Confronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions, and that the issue may profitably be tried in one suit. *See Green v. Wolf Corporation,* 460 F.2d 291, 298 (2d Cir. 1968);

Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968); *Harris v. Palm Springs Alpine Estates*, 329 F.2d 909 (9th Cir. 1964); *U. S. Financial Securities Litigation*, 64 F.R.D. 443 (S.D. Cal. 1974); *Aboudi v. Daroff*, 65 F.R.D. 388 (S.D.N.Y.1974); *Werfel v. Kramarsky*, 61 F.R.D. 674 (S.D.N.Y.1974); *In re Memorex Security Cases*, 61 F.R.D. 88 (N.D.Cal.1973); *Siegel v. Realty Equities Corporation of New York*, 54 F.R.D. 420 (S.D.N.Y.1972); *Herbst v. Able*, 47 F.R.D. 11 (S.D.N.Y.1969); *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D. N.Y.1968); *Siegel v. Chicken Delight, Inc.*, 271 F.Supp. 722 (N.D.Cal.1967); *Fischer v. Kletz*, 41 F.R.D. 377, 381 (S.D. N.Y.1966); *Kronenberg v. Hotel Governor Clinton, Inc.*, 41 F.R.D. 42 (S.D.N.Y.1966). As we stated in *Harris, supra:*

> "Appellees assert that the various investors made payments on the securities at different times and stand in different positions . . . [S]ince the complaint alleges a common course of conduct over the entire period directed against all investors, generally relied upon, and violating common statutory provisions, it sufficiently appears that the questions common to all investors will be relatively substantial." 329 F.2d at 914.

Those views are consistent with the views of the Advisory Committee on the Rule: "[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action . . ." Advisory Committee on Rule 23, Proposed Amendments to the Rules of Civil Procedure, 39 F.R.D. 69, 103 (1966). The availability of the class action to redress such frauds has been consistently upheld, *see In re Caesars Palace Securities Litigation*, 360 F.Supp. 366, 395-96 (S.D.N.Y.1973), in large part because of the substantial role that the deterrent effect of class actions plays in accomplishing the objectives of the securities laws. *See* III Loss, Securities Regulation 1819 (2d ed. 1961) ("the ultimate effectiveness of [the security antifraud laws] may depend on the applicability of the class action device").

While the nature of the interrelationship and the degree of similarity which must obtain between different representations in order to come within the outer boundaries of the "common course of conduct" test is somewhat unclear,[19] the

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[19]Because plaintiffs have alleged specific strands of misrepresentation running throughout financial statements of the class period, they are well within whatever the outer boundaries might be, and we need not resolve the issue. We note, however, that a number of courts have apparently held that allegations simply that earnings and stock price have been inflated over a period of time by a defendant's misrepresentations is sufficient to satisfy the common question requirement (although the cases are somewhat unclear because they fail to specify the precise misrepresentations which allegedly inflated earnings). *See Fischer v. Kletz, supra; Kronenberg, supra; Werfel v. Kramarsky, supra. See Feldman v. Lifton,* 64 F.R.D. 539, at 544-545 (S.D.N.Y. 1974). Appellants point out that allegation of inflation of earnings or price is conclusionary, and may derive from altogether unrelated misrepresentations. In their view the common question requirement is met only if all purchasers are injured by the same misrepresentation, or, in a "course of conduct" case, by identical repeated misrepresentations, and if defendant's liability can be established by proof both of the same set of facts and same legal principle. We think that is far to restrictive a view of the common question requirement in the securities fraud context. Rule 10b-5 liability is not restricted solely to isolated misrepresentations or omissions; it may also be predicated on a "practice, or course of business which operates . . . as a fraud . . ." Under that section class members may well be united in establishing liability for fraudulently creating an illusion of prosperity and false expectations.

Moreover, even when misrepresentations are unrelated, class members may share a common question of law or fact. Of course, if an early misrepresentation is undissipated, a later purchaser will present a common question even if another misrepresentation has intervened. But even if the effect of the earlier misrepresentation is dissipated, proof of the earlier misrepresentation may be relevant to the latter purchaser's case. Proof of the earlier fraud and its effects might be relevant circumstantially to establish duty standards, culpability, or damages regarding the later fraud; it would establish background information about the defendant common to both suits. Thus, even when unrelated misrepresentations are alleged as part of a common scheme, class members may share common factual questions, and trial in the same forum avoids duplicative proof. That is a major purpose of a class action; the "common question" requirement should be interpreted to obtain that objective. Naturally, when the component misrepresentations of a "course

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test is more than satisfied when a series of financial reports uniformly misrepresent a particular item in the financial statement. In that situation, the misrepresentations are "interrelated, interdependent, and cumulative;" "[l]ike standing dominoes . . . one misrepresentation . . . cause[s] subsequent statements to fall into inaccuracy and distortion when considered by themselves or compared with previous misstatements." *Fischer v. Kletz, supra,* at 381.

Precisely such a situation is alleged here in at least three respects—the failure to create adequate reserves for uncollectible accounts receivable and for contractually guaranteed royalty payments, and the overstatement of inventory. The 1972 Annual Report shows writedowns of $31.9 million as provision for royalty guarantees, $11.8 million for uncollectible accounts receivable and $15 million for inventory. Plaintiffs allege that the writedowns had roots tracing back to the beginning of the class period, an allegation somewhat borne out by the auditors' withdrawal of certification of the 1971 report because of uncertainty that the huge losses reported in 1972 were the product of 1972 business operations, and not attributable to earlier years. Plaintiffs contend that the company's financial reports throughout the period uniformly and fraudulently failed to establish reserves in amounts adequate to satisfy accepted accounting principles, injuring all purchasers of the consequently inflated stock.

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of conduct" fraud are unrelated, a great many more non-common questions exist. In that situation no representative's claim may be typical of the rest of the class, Rule 23(a)(3), although that depends on how broadly that requirement is construed. *See* text at note 25, *infra,* and note 25 *infra.* We think it is for the predominance and other requirements of Rule 23(b)(3), rather than the common question requirement, to function to keep the balance between the economies attained and lost by allowing a class action. The common question requirement should not be restrictively interpreted to attain that objective, particularly as to do so would eliminate the class action deterrent for those who engage in complicated and imaginative rather than straightforward schemes to inflate stock prices.

In this aspect, plaintiffs allege a source of inflation common to every purchaser. The creation of a reserve is of course simply an adjustment made to the balance sheet and income statement to provide a more realistic view of the business and its operations. Failure in any particular period to recognize that a portion of the accounts receivable generated in that period are uncollectible, and to create or adjust a reserve, will have the effect of inflating the balance sheet assets and surplus, and overstating the income for the period; likewise failure to recognize accrued liabilities for royalty payments will inflate surplus by understating liabilities, and will overstate income. Naturally, any inflation in the stock price due to inadequate reserves will persist until the reserves become adequate or until the losses are in fact written off.

Defendants nevertheless contend that a class is improper because each purchaser must depend on proof of a different set of accounting facts to establish the inadequacy of the reserves at the time he bought. Defendants misconceive the requirement for a class action; all that is required is a common issue of law *or* fact. Even were we to assume that the reserves were at some points during the period adequate, the class members still would be united by a common interest in the application to their unique situation of the accounting and legal principles requiring adequate reserves—*i. e.*, by a common question of law.[20] Here, how-

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[20]Appellants make much of the distinction between an accounting principle and estimate, arguing that the exercise of judgment involved in an estimate depends on analysis of facts which change, making legal evaluation of different estimates distinct legal and factual problems. The distinction makes little sense in this context. The judgment necessary to make an estimate must be controlled by the accounting principle. Thus, even when only detached, unconnected incidents of incorrect estimates are alleged, the jury must nevertheless be appraised of the common standard of law by which to judge the estimates—the accounting principle—and a common question is presented. Insofar as a class action is involved, the

(Footnotes continued on following page)

ever, in light of the progressive deterioration of Ampex's financial position and the magnitude of the losses at the end of the period, even the fact that reserves were in reality inadequate throughout much if not all of the period may not be in serious dispute; rather, the question will be whether the inadequacy was in some sense culpable because the contingencies which proved them inadequate were foreseen or foreseeable.

The alleged inventory overvaluation likewise presents common issues. Defendants again contend it does not because the valuation of any particular period's closing inventory involves a process of physical estimation based on that inventory's characteristics, and that overstatement of one period's closing inventory, while overstating that period's income, will have an opposite effect on the next period's income by overstating opening inventory, deflating rather than inflating stock price. While true in the abstract, appellants' position disregards the real substance of the plaintiffs' complaint which is again highlighted by the 1972 Report. In explaining the $15 million writedown, the company stated: "Inventories of stereo tapes more than six months old and more than one year old were written down 50% and 100% respectively . . . No significant writedown of this nature were made in the prior year."

Plaintiffs thus are complaining of the balance sheet effect of inventory overvaluation. They are alleging that by failing throughout the class period to recognize and account for inventory obsolescence each time the inventory was valued, the company consistently inflated the value at which

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situation is the same as where a consistent misapplication of an accounting principle as part of a course of conduct to inflate the stock price is alleged. And, moreover, it appears to us, contrary to appellants' contentions, that plaintiffs are complaining of abuses of accounting principles, not estimates.

it carried inventory on the balance sheet.[21] In effect, plaintiffs are complaining of a consistent disregard of the accounting principle that inventory be valued at "lower of cost or market." Again, common questions of law and facts are presented.

The class members also share an interest in establishing the standard of care required of the various defendants under the *White v. Abrams,* 495 F.2d 724 (9th Cir. 1974), flexible duty standard. The flexible duty of any defendant, while depending on his particular relationship to Ampex and to the financial reporting involved, will be owed identically to all market purchasers, who are for practical purposes identically situated. The culpability of each defendant's conduct is to be measured against the statutorily imposed duty not to manipulate the market. Differences in sophistication, etc., among purchasers have no bearing in the impersonal market fraud context, because dissemination of false information necessarily translate through market mechanisms into price inflation which harms each purchaser identically. *See U.S. Financial Securities Litigation, supra,* at 451-452.

Moreover, because of the relative similarity of the various documents involved, the duty owed by a defendant with respect to such documents will probably be uniform or nearly so, further uniting the positions of all class purchasers.

2. *Predominance and reliance.*

Defendants contend that any common questions which may exist do not predominate over individual questions of reliance and damages.

The amount of damages is invariably an individual question and does not defeat class action treatment. *E. g.,*

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[21]Whether inflation of assets rather than earnings is material to the stock price is for the jury, not us, to decide.

U.S. Financial Securities Litigation, supra, at 448 n. 5, and cases there cited. Moreover, in this situation we are confident that should the class prevail the amount of price inflation during the period can be chartered and the process of computing individual damages will be virtually a mechanical task. *See* n. 24 *infra.*

Individual questions of reliance are likewise not an impediment—subjective reliance is not a distinct element of proof of 10b-5 claims of the type involved in this case.

The class members' substantive claims either are, or can be, cast in omission or non-disclosure terms—the company's financial reporting failed to disclose the need for reserves, conditions reflecting on the value of the inventory, or other facts necessary to make the reported figures not misleading. The Court has recognized that under such circumstances

> "involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact." (citations omitted)

Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 153-154, 92 S.Ct. 1456, 1472, 31 L.Ed.2d 741 (1972). *See U.S. Financial Securities Litigation, supra,* at 451; *Caesars Palace Securities Litigation, supra,* at 399; *In re Penn Central Securities Litigation,* 347 F.Supp. 1327, 1344 (E.D.Penn.1972).

Moreover, proof of subjective reliance on particular misrepresentations is unnecessary to establish a 10b-5 claim for a deception inflating the price of stock traded in the

open market. *See Herbst v. I. T. T. supra,* at 1315-1316; *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.,* 480 F.2d 341, 373-374 (2d Cir. 1973); *Tucker v. Arthur Andersen & Co.,* 67 F.R.D. 468, at 480 (S.D.N.Y. 1975); *U. S. Financial Securities Litigation, supra,* at 449-451; *Werfel v. Kramarsky, supra,* at 681; *In re Memorex Security Cases, supra,* at 100-101; *Siegel v. Realty Equities Corporation of New York, supra,* at 424-425; *Herbst v. Able, supra,* at 20. Proof of reliance is adduced to demonstrate the causal connection between the defendant's wrongdoing and the plaintiff's loss. We think causation is adequately established in the impersonal stock exchange context by proof of purchase and of the materiality of misrepresentations, without direct proof of reliance. Materiality circumstantially establishes the reliance of some market traders and hence the inflation in the stock price—when the purchase is made the causational chain between defendant's conduct and plaintiff's loss is sufficiently established to make out a prima facie case. *See In re Memorex Security Cases, supra,* at 101; Note, *The Reliance Requirement in Private Actions Under SEC Rule 10b-5,* 88 Harv.L.Rev. 584, 593 (1975).

Defendants argue that proof of causation solely by proof of materiality is inconsistent with the requirement of the traditional fraud action that a plaintiff prove directly both that the reasonable man would have acted on the misrepresentation (materiality), and that he himself acted on it, in order to establish the defendant's responsibility for his loss, which justifies the compensatory recovery.

We disagree. The 10b-5 action remains compensatory; it is not predicated solely on a showing of economic damage (loss causation). We merely recognize that individual "transactional causation" can in these circumstances be inferred from the materiality of the misrepresentation, *see Tucker v. Arthur Andersen & Co., supra,* at 480; *Schlick v.*

Penn-Dixie Cement Corp., 507 F.2d 374, 381-382 (2d Cir. 1974), and shift to defendant the burden of disproving a prima facie case of causation. Defendants may do so in at least 2 ways: 1) by disproving materiality or by proving that, despite materiality, an insufficient number of traders relied to inflate the price; and 2) by proving that an individual plaintiff purchased despite knowledge of the falsity of a representation, or that he would have, had he known of it.[22]

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[22]A number of cases indicate that proof of materiality raises "presumption" of reliance. The Court did not speak of a presumption in *Mills* or *Affiliated Ute;* we prefer to recognize that materiality directly establishes causation more likely than not, and that reliance as a separate requirement is simply a milepost on the road to causation. The net result is in either view the same; the validity of either view turns on the assumption that the particular investor is more likely to act like the reasonable investor than not.

There is some debate as to whether the "presumption" of reliance may be rebutted; the general view is that it may be, *see* Harvard Note, *supra,* at 600 and 600 n. 75, and cases there cited, although sound contrary opinion exists. *See Herbst v. ITT, supra,* at 1316 n. 14; *Chris-Craft Industries, Inc., supra,* at 400 (Mansfield, J., concurring and dissenting). The 10b-5 private suit serves a public purpose, but has done so since its judicial creation in the framework of a private damage suit. We doubt the right to disprove causation will substantially reduce a defendant's liability in the open market fraud context, as we doubt that a defendant would be able to prove in many instances to a jury's satisfaction that a plaintiff was indifferent to a material fraud. Nevertheless, we think the public purpose can be adequately served within the traditional compensatory suit framework by limiting recoveries to those who are in fact injured, and excluding those whom a defendant proves have not been injured, and that 10b-5 suits should continue in that mold until a contrary need appears or until the Court directs otherwise.

The right of rebuttal, however, does not preclude the predominance of common questions. Causation as to each class member is commonly proved more likely than not by materiality. That showing will undoubtedly be conclusive as to most of the class. The fact that a defendant may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones; plaintiffs satisfy their burden of showing causation as to each by showing materiality as to all.

The right to disprove causation will not render the action unmanageable. A defendant does not have unlimited rights to discovery against unnamed class members; the suit remains a repre-

That the prima facie case each class member must establish differs from the traditional fraud action, and may, unlike the fraud action, be established by common proof, is irrelevant; although derived from it, the 10b-5 action is not coterminous with a common law fraud action. As we recently recognized in *White v. Abrams,* the fraud action must be and has been flexibly adopted to the overriding purpose of enforcing the Federal securities laws. 495 F.2d at 731. *See Affiliated Ute, supra,* at 151; *Superintendent of Insurance v. Bankers Life & Casualty Co.,* 404 U.S. 6, 12, 92 S.Ct. 165, 30 L.Ed.2d 123 (1971); *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970); *SEC v. Capital Gains Research Bureau,* 375 U.S. 180, 186, 195, 84 S.Ct. 275, 11 L.Ed.2d 237 (1963).

Here, we eliminate the requirement that plaintiffs prove reliance directly in this context because the requirement imposes an unreasonable and irrelevant evidentiary burden. A purchaser on the stock exchanges may be either unaware

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sentative one. *See Clark v. Universal Builders, Inc.,* 501 F.2d 324 (7th Cir. 1974); *Gardner v. Awards Marketing Corporation,* 55 F.R.D. 460 (D.Utah 1972); *Fischer v. Wolfinbarger,* 55 F.R.D. 129 (W.D.Ky. 1971). The district judge may reasonably control discovery to keep the suit within manageable bounds, and to prevent fruitless fishing expeditions with little promise of success. He may also exercise discretion in the conduct of the trial, to prevent a time-consuming series of mini-trials on causation, by limiting introduction of repetitive evidence, or by limiting evidence to instances where causation is in doubt; he may also postpone trial of the rebuttal of individual causation until the damage stage of the trial; indeed, he has extensive powers to expedite the suit with procedural innovations. *See* Rule 23(d). We think procedures can be found and used which will provide fairness to the defendants and a genuine resolution of disputed issues while obviating the danger of subverting the class action with delaying and harassing tactics. If not, we may have to reconsider whether to make proof of causation from materiality conclusive, keeping in mind that the Court has directed that the statute be liberally construed to effectuate its remedial purposes, and that that purpose may be served only by allowing an over-inclusive recovery to a defrauded class if the unavailability of the class device renders the alternative a grossly underinclusive recovery.

of a specific false representation, or may not directly rely on it; he may purchase because of a favorable price trend, price earnings ratio, or some other factor. Nevertheless, he relies generally on the supposition that the market price is validly set and that no unsuspected manipulation has artificially inflated the price, and thus indirectly on the truth of the representations underlying the stock price—whether he is aware of it or not, the price he pays reflects material misrepresentations. Requiring direct proof from each purchaser that he relied on a particular representation when purchasing would defeat recovery by those whose reliance was indirect, despite the fact that the causational chain is broken only if the purchaser would have purchased the stock even had he known of the misrepresentation. We decline to leave such open market purchasers unprotected. The statute and rule are designed to foster an expectation that securities markets are free from fraud—an expectation on which purchasers should be able to rely.

Thus, in this context we think proof of reliance means at most a requirement that plaintiff prove directly that he would have acted differently had he known the true facts. That is a requirement of proof of a speculative negative (I would not have bought had I known) precisely parallel to that held unnecessary in *Affiliated Ute* and *Mills* (I would not have sold had I known). We reject it here for the same reasons. Direct proof would inevitably be somewhat pro-forma, and impose a difficult evidentiary burden, because addressed to a speculative possibility in an area where motivations are complex and difficult to determine. That difficulty threatens to defeat valid claims—implicit in *Affiliated Ute* is a rejection of the burden because it leads to underinclusive recoveries and thereby threatens the enforcement of the securities laws. *See* Harv. Note, *supra,* at 590-91. Here, the requirement is redundant—the same causal nexus can be adequately established indirectly, by proof of

materiality coupled with the common sense that a stock purchaser does not ordinarily seek to purchase a loss in the form of artificially inflated stock.[23] Under those circumstances we think it appropriate to eliminate the burden.

Defendants contend that elimination of individual proof of subjective reliance alters and abridges their substantive rights in violation of the Rules Enabling Act, 28 U.S.C. § 2072. The obvious answer is that the standards of proof of causation we have set out apply to all fraud on the market cases, individual as well as class actions. No interpretation of Rule 23 is involved, and the Rules Enabling Act limitation is not implicated.[24]

C. *Conflicts*

Defendants' final major argument is that conflicts among class members preclude class certification. They contend that the interests of class members in proving damages from price inflation (and hence the existence and materiality of misrepresentations subsumed in proving inflation) irreconcilably conflict, because some class members will desire to maximize the inflation existing on a given date while others will desire to minimize it. For example, they posit that a purchaser early in the class period who later sells will desire to maximize the deflation due to an intervening corrective disclosure in order to maximize his out of pocket

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[23] *Raschio v. Sinclair*, 486 F.2d 1029 (9th Cir. 1973), is in no way inconsistent with our present position. There we dealt with the statutory "in connection with" requirement, and held that it could not be met as a matter of law when the stock was purchased two months before the allegedly fraudulent representation was made. Here we do not retreat from that position, or from the implicit requirement set out there that there be a reasonable transactional nexus between the fraud and the loss—we simply amplify on the manner in which that nexus may be proved.

[24] Indeed, we could, in the exercise of our Article III jurisdiction, transform the 10b-5 suit from its present private compensatory mold by predicating liability to purchasers solely on the materiality of a misrepresentation (*i. e.*, economic damage) regardless of transactional causation, without implicating the Enabling Act limitation.

damages, but in so doing will conflict with his purchaser, who is interested in maximizing the inflation in the price he pays. We agree that class members might at some point during this litigation have differing interests. We altogether disagree, for a spate of reasons, that such potential conflicts afford a valid reason at this time for refusing to certify the class.

Defendants' position depends entirely on adoption of the out of pocket loss measure of damages, rather than a rescissory measure. Under the out of pocket standard each purchaser recovers the difference between the inflated price paid and the value received, plus interest on the difference. If the stock is resold at an inflated price, the purchaser-seller's damages, limited by § 28(a) of the Act, 15 U.S.C. § 78bb(a) to "actual damages," must be diminished by the inflation he recovers from his purchaser. Thus, he is interested in proving that some intervening event, such as a corrective release, had diminished the inflation persisting in the stock price when he sold.[25]

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[25]Appellants contend that the inflation paid must be measured by the change in price after a corrective release. That drop is of course circumstantial evidence of the inflation when purchased, but it is not the exclusive method of measuring inflation. The fact finder may rely on other methods of determining actual value on the date of purchase, including expert testimony on actual value derived from capitalization of earnings techniques or testimony on book value. Particularly where, as here, the amount of inflation due to absence or insufficiency of reserves may fluctuate, such evidence is necessary in the absence of corrective releases. In any event, the drop after a corrective disclosure will not be conclusive of the amount of original inflation, both because the correction may be only partial (as is alleged of the major corrections involved here), and because the prolonged nature of the fraud introduces other market variables which may affect the amount the market reacted to disclosures at different times during the class period. Stanford Note, *infra*, at 384-385; *Tucker v. Arthur Andersen & Co.*, *supra*, at 482. However, from an appropriate mix of the various methods we are confident that the jury will be able to trace a graph delineating the actual value of the stock throughout the class period. When compared with a comparable graph of the price the stock sold at, the determination of damage will be a mechanical task for each class member.

While out of pocket loss is the ordinary standard in a 10b-5 suit, *Foster v. Financial Technology, Inc.*, 517 F.2d 1068, at 1071 (9th Cir. 1975); *Jonigan v. Taylor*, 344 F.2d 781, 786 (1st Cir. 1965); *Estate Counseling Service, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 303 F.2d 527 (10th Cir. 1962); *Abrahamson v. Fleschner*, 392 F.Supp. 740, at 746 (S.D.N.Y.1975); *see Sigafus v. Porter*, 179 U.S. 116, 123, 21 S.Ct. 34, 45 L.Ed. 113 (1900); *Smith v. Bolles*, 132 U.S. 125, 10 S.Ct. 39, 33 L.Ed. 279 (1889); Note, *The Measure of Damages in Rule 10b-5 Cases Involving Actively Traded Securities*, 26 Stan.L.Rev. 371, 383-384 (1974); 3 A. Bromberg, Securities Law, Fraud—Rule 10b-5, § 9.1, at 226-227 (1974), it is within the discretion of the district judge in appropriate circumstances to apply a rescissory measure, *Chasins v. Smith, Barney & Co.*, 438 F.2d 1167, 1173 (2d Cir. 1970); *Abrahamson v. Fleschner, supra*, at 746; *see* Stanford Note, *supra*, at 374-376; A. Bromberg, *supra*, at 226, or to allow consequential damages. *Foster, supra*, at 3; *Zeller v. Bogue Elec. Mfg. Co.*, 476 F.2d 795, 802-803 (2d Cir. 1973). It is for the district judge, after becoming aware of the nature of the case, to determine the appropriate measure of damages in the first instance; the possible creation of potential conflicts by that decision does not render the class inappropriate now. The Rule provides the mechanism of subsequent creation of subclasses, Rule 23(c)(4), to deal with latent conflicts which may surface as the suit progresses. *Green v. Wolf Corporation, supra*, at 299; *Tucker v. Arthur Andersen & Co., supra*, at 482; *Handwerger v. Ginsberg*, CCH Fed.Sec.L.Rep. ¶ 94,934, at 97,241 (S.D.N.Y.1975); *Caesars Palace Securities Litigation, supra*, at 398; *Sol S. Turnoff v. N. V. Nederlandsche Combinatie Voor Chemische Industrie*, 51 F.R.D. 227, 233 (E.D. Pa.1970). As a result, courts have generally declined to consider conflicts, particularly as they regard damages, sufficient to defeat class action status at the outset unless the

conflict is apparent, imminent, and on an issue at the very heart of the suit. *See Hawk Industries, Inc. v. Bausch & Lomb, Inc.*, 59 F.R.D. 619 (S.D.N.Y. 1973); *Siegel v. Realty Equities Corporation of New York, supra,* at 426.

Here, the conflict, if any, is peripheral, and substantially outweighed by the class members' common interests. Even assuming *arguendo* that the out of pocket standard applies, the class is proper. Every class member shares an overriding common interest in establishing the existence and materiality of misrepresentations. The major portion of the inflation alleged is attributed to causes which allegedly persisted throughout the class period. It will be in the interest of each class member to maximize the inflation from those causes at every point in the class period, both to demonstrate the *sine qua non*—liability—and to maximize his own potential damages—the more the stock is inflated, the more every class member stands to recover. Moreover, because the major portion of the inflation is attributed to causes persisting throughout the period, interim corrective disclosures (of which there appear to have been only two or three) do not necessarily bring predisclosure purchasers into conflict with post-disclosure purchasers. Because both share an interest in maximizing overall inflation, the latter purchaser will no doubt strive to show a substantial market effect from disclosure of the lesser (or partial) causes of inflation to maximize the inflation attributable to more serious causes persisting when he bought—a showing which will increase the recovery of the earlier purchaser. In that light, any conflicting interests in tracing fluctuations in inflation during the class period are secondary, and do not bar class litigation to advance predominantly common interests. Courts faced with the same situation have repeatedly, either explicitly or implicitly, rejected defendants' position, for the poten-

tial conflict is present in most prolonged classes involving a series of misrepresentations. *See Green v. Wolf Corporation, supra; Tucker v. Arthur Andersen & Co.*, at 475-476 and 476 n. 14, and cases there cited, and at 97,936; *Aboudi v. Daroff, supra,* at 391-392; *U. S. Financial Securities Litigation, supra,* at 452; *In re Memorex Security Cases, supra; Caesars Palace Securities Litigation, supra; Siegel v. Realty Equities Corporation of New York, supra,* at 426; *Dolgow v. Anderson, supra; Fischer v. Kletz, supra,* at 381-383; *Kronenberg, supra.*

In support of that conclusion, we note that Rule 23 makes no mention of conflicts. The Rule's requirements are that the representative's claims be "typical" and that the class be "fairly and adequately" represented—claims need not be coextensive. *Caesars Palace Securities Litigation, supra,* at 397. Those requirements are in part constitutionally dictated, as due process requires, in order to give collateral res judicata effect to a judgment against class members, that their interests have been adequately represented in the class action. *Hansberry v. Lee,* 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940).

Hansberry does not, however, as defendants seem to assume, dictate that any divergence of interest among class members violates due process (thereby necessarily requiring an identity of interests to satisfy Rule 23's adequacy or representation and typicality requirements). Neither the Rule's requirements nor those of due process are so inflexible. The due process touchstone of adequacy and fairness of representation (*see In re Four Seasons Securities Laws Litigation*, 502 F.2d 834, 842 (10th Cir. 1974); *Eisen IV*, at 177) must be judged in light of the seriousness and extent of conflicts involved compared to the importance of issues uniting the class; the alternatives to class representation

available;[26] the procedures available to limit and prevent unfairness; and any other facts bearing on the fairness with which the absent class member is represented.

Hansberry is not controlling here—in *Hansberry* there was nothing to satisfy due process. Not only were the members of the purported class of property owners diametrically opposed on the central issue—the validity of racial covenants restricting their property— but the state class action procedure provided absent class members no notice. Here, on the other hand, under the notice and opt-out procedure of Rule 23(b)(3) and 23(c)(2), an absent class member may evaluate his position in the class and decide for himself whether to avail himself of the representation offered. *See, e.g., Four Seasons Securities Laws Litigation, supra,* at 842-844; *Herbst v. Able, supra,* at 15. The potential conflicts are at most peripheral. And the district judge will retain constant supervision, through his powers under Rule 23(d) and (e), and through his ability to decertify or create subclasses, to assure fairness of representation. *See Dolgow v. Anderson, supra,* at 496. Finally, and unlike numerous cases in which even one representative has been held adequate to represent a prolonged class, the class members here will be represented by numerous named representatives, with substantial personal stakes, who purchased throughout the class period, and who thus will probably represent whatever

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[26]The rule requires adequate representation. The alternative may be none at all.

> "The basic concept of commonality, a requirement which is prevalent throughout Rule 23 and is premised upon a fundamental recognition that representatives of a class must have interests which are not in opposition to the members of that class, must be interpreted to best effectuate the primary purposes of the class action device, i. e., to give small investors a reasonable opportunity to vindicate their claims in a manner which will not place an undue burden upon them. It is in this light that we must approach the defendants' objections to the instant class actions under Rule 23(a)(3)." *Caesars Palace Securities Litigation, supra,* at 397-398.

conflicting interests there are in the development of plaintiffs, trial strategies. In light of those various factors, we agree with the district judge that the class representatives are typical and will adequately and fairly represent the class.[27]

Affirmed.

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[27]We likewise reject the contention that conflicts between debenture holders and shareholders require decertification at this time; *see Handswerger v. Ginsberg, supra,* at 97, 240-97, 241; *Caesars Palace Securities Litigation, supra,* at 398-399; *Fischer v. Kletz, supra,* at 384; or that present shareholders and those purchasers who have sold their shares irreconcilably conflict. *See Handswerger, supra,* at 97, 240 n. 3; *Herbst v. ITT, supra,* at 1314; *Herbst v. Able, supra,* at 15.

JUDGMENT OF THE COURT OF APPEALS

United States Court of Appeals
For the Ninth Circuit

William E. Roberts, John P. Buchan, William Blackie, etc., et al., Defendants-Appellants, v. Leonard Barrack, Selma Molder, etc., et al., Plaintiffs-Appellees.	No. 74-2648 Civil 72-0521

APPEAL from the United States District Court for the NORTHERN District of CALIFORNIA

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the NORTHERN District of CALIFORNIA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

A True Copy Attest Feb 27, 1976
Emil E. Melfi, Jr., Clerk
by Tim Jones, Deputy
Filed and entered September 25, 1975

APPENDIX B

MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT

Original Filed Apr 11 1974
Clerk, U.S. Dist. Court
San Francisco

In the United States District Court
for the Northern District of California

Master File No. C-72-360 SW

In Re Consolidated Pretrial)
Proceedings in Ampex Securities Cases)

This document relates to:
Molder (formerly BARRACK)
File No. C-72-521 SW

MEMORANDUM OPINION AND ORDER

This action is brought by Mrs. Barrack, through her executors, Leonard Barrack, Pearl Singer Molder and Selma Molder, on behalf of herself (now her estate) and all other purchasers of Ampex securities between May 2, 1970 and August 3, 1972. The complaint charges violations of sections 10(b) and 13(a) of the 1934 Securities and Exchange Act, 15 U.S.C. § 78j(b) and § 78n(a) and the Rules 10b-5 and 13 promulgated thereunder, 15 C.F.R. 240.10b-5 and 240.13.[1] Jurisdiction is premised on 15 U.S.C. § 78aa.

This action is before the Court on plaintiffs' motion to certify a class. It is this motion to which the Court will address itself.

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[1]The amended Molder complaint also contains a count of breach of fiduciary duty against defendant Roberts brought derivatively under alternative theories of 10b-5 violations and common law. This count has been previously dismissed on defendant Robert's [sic] 12(b)(6) motion. Thus the Court will not address any objections to certification based upon this count.

After careful consideration of the volumes of papers submitted, the arguments and authorities on both novel and well worn theories, the Court finds that a conditional class defined as all Ampex security purchasers within the designated 27-month period is warranted. Rule 23(c)(1). The Court, however, on a proper factual showing, reserves the right to reduce or expand the class as to time, types of securities, or types of transactions, to designate appropriate subclasses and to terminate the class. Rule 23(c)(4).

FACTS

Although this is extremely complicated litigation not easily summarized, the crux of the allegations is that Ampex and its officers, directors and auditors (Touche Ross) conspired and aided and abetted in misrepresenting, in various publications, the corporation's earnings and financial condition. These publications include, but are not limited to annual reports, interim reports, press releases, and SEC filings.[2] The period of time, over which these violations allegedly occurred and coinciding with the period of this class, commenced May 2, 1970 when the 1970 annual report issued,[3] and terminated August 3, 1972 when Touche Ross withdrew its certificate.[4]

More specifically plaintiffs claim that defendants misrepresented the corporation's financial security by the deceitful use of certain accounting procedures. It is claimed that the corporation's reports did not reveal specific crucial items,

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[2]During the 27-month period in question there are claimed to have been 3 annual reports, six quarterly interim reports, 469 press releases and 119 filings with the SEC. Although not definitively narrowed, it seems that the alleged violations involve some 45 of these publications.

[3]There appears to be a factual dispute concerning the date of the 1970 annual report. The plaintiffs claim the class begins with the issuance of this document May 2, 1970 but some defendants claim that it did not issue until July 1970.

[4]In this 27-month period there were 570 business days during which there were 120,000 transactions in Ampex securities with a total of 21,000,000 shares traded.

e.g., the true depreciated value of inventories, deferred research and development expenses, accurate asset to liability ratios, contingent liabilities not covered by adequate reserves, and the accurate value of discontinued items. The cumulative effect, according to plaintiffs, was to give the investment community the impression that Ampex was more secure than was perhaps warranted, thus causing its stock to sell at artificially inflated prices. In mid-1972 Ampex reported an approximate $90,000,000 loss.

Plaintiffs further allege that throughout this 27-month period between the initiation of these deceptive practices and the precipitous fall, Ampex took steps to partially correct certain "accounting errors."[5] These corrections allegedly caused downward adjustments in the value of Ampex securities, but these corrections also allegedly had the effect of lulling investors into believing the corporation's financial position was finally stable when, in reality, more distressing financial news was forthcoming.

The class that plaintiffs seek to represent encompasses all purchasers of Ampex securities within the 27-month period. At this point no one really knows how many members this class would include, although the defendants estimate that it could include upwards of 100,000 investors.[6] The class purportedly include both past and present shareholders and debenture holders.

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[5]Some examples of these partial disclosures are as follows: the announcement March 16, 1971 that the company had not been expensing research and development currently, resulting in a 10.7 million dollar loss; the announcement January 11, 1972 of a 40 million dollar loss due to lack of reserves to cover contingent liabilities, doubtful accounts, and discontinued lines; the announcement shortly after January 1972 that 40 million was a low estimate of the loss; and the announcement in the 1972 annual report (March, 1972) of an 86 million dollar loss for the whole year.

[6]Of these investors it is estimated that perhaps 35,000 also resold during the period and 46,000 no longer hold Ampex securities.

Based upon these statistics, all parties agree that the asserted class is so numerous that joinder is impracticable, Rule 23(a)(1), but there is no agreement on the other requirements of Rule 23.[7]

Defendants have raised many potential problems which could affect the viability of this proposed class. Fulfillment of all Rule 23 requirements aside from 23(a)(1), numerosity, has been challenged on several theories. After tedious culling, the Court is of the opinion that the arguments concerning manageability, superiority and adequacy of representation by plaintiffs' attorneys to the extent not handled *infra* lack merit. No doubt management of this class will not be simple, but the Court does not envision the necessity of thousands of days of trial with hundreds of interlocking subclasses before several juries, as feared by defendants.

Any conflicts that Mrs. Barrack's executors as class representatives may have with their role as executors does not affect their ability to represent the members of this class. Whether their role herein would pose a justiciable issue for the estate or beneficiaries thereof would necessarily have to be raised and litigated elsewhere. It does not conceivably create representation problems here.

Other issues raised concerning the competency of plaintiff's counsel to represent this class are unconvincing and not worthy of discussion.

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[7]The § 13(a) claim in Count II cannot proceed as a class action and must be pursued individually by the named plaintiffs. Defendants allege and the Court agrees that private actions for 13(a) violations can only proceed under the authority of § 18(a), 15 U.S.C. § 78r(a). *In re Penn Central Securities Litigation*, 347 F.Supp. 1327, 1340 (E.D. Pa. 1972). Section 18(a) requires by its very language individual, subjective reliance by those seeking relief thereunder. See, *Heit v. Weitzen*, 402 F.2d 909, 916 (2d Cir. 1968). Requiring proof of individual reliance for each class member would necessarily defeat commonness of issues of law or fact and preclude a class action on that count. This does not, of course, preclude the certification of the class for the purposes of the 10b-5 count. Rule 23(c)(4)(A).

Accordingly, in passing on plaintiffs' motion the Court will only focus on the questions of commonality of fact or law and a number of the alleged conflict of interest problems.

COMMON ISSUES OF LAW AND FACT AND PREDOMINANCE OF COMMON QUESTIONS

Defendants argue that there is no commonality on the issues in this action because the only commonness pleaded is conspiracy; that is plaintiffs seek to tie a series of individual wrongs together with a veil of conspiracy. That allegations of conspiracy alone cannot create common issues of fact and law is not disputed. See *Richland v. Cheatham,* 272 F.Supp. 148 (S.D.N.Y. 1967). Although confusingly pleaded, the Court is convinced from the total record that conspiracy is not the lynch pin which holds this cause of action together. Conspiracy is only the device employed by plaintiffs to sweep in the numerous defendants.

The common issues of law and fact and the common issues which predominate are the various alleged misrepresentations and omissions originating in the May 2, 1970 annual report concerning overstated inventory, buried research and development costs and misstated current ration [sic] of assets to liabilities, among other things, creating an erroneous image of prosperity. These possible accounting failings which are alleged § 10(b) violations reappear again in the 1971 annual report along with other alleged misrepresentations. The incidents of fraud were then allegedly repeated and enhanced in the various other publications purported to be links in this chain of misrepresentations. This appears to the Court to be the classic situation of the "standing dominoes" discussed in *Fischer v. Kletz,* 41 F.R.D. 377, 381 (S.D.N.Y. 1966). If it is proved, for instance, that the value of the inventory was materially mispresented [sic] in the 1970 Annual Report, mere proof of

the repetition of this overstatement would suffice to prove another violation. Since this would also be true for each of the alleged representations or omissions, the Court is of the opinion that the allegations constitute a "common course of conduct over the entire period, directed against all investors. . . ," *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 914 (9th Cir. 1964), cited also in *Fischer v. Kletz, supra* at 381. See also the analysis of the Fischer rationale in *Richland v. Cheatham, supra* at 155.

This case is admittedly more complicated than *Fischer,* with many more potential representations and possible interim intervening curative representations which may or may not eliminate the causal effect of some of the alleged accounting misrepresentations. These complications, although troublesome to the proof of causation and damage, do not militate against this finding of commonness upon the record now before us.

Defendants also argue that actual subjective reliance must necessarily be required before recovery could be granted, especially in a non-privity case such as this,[8] and that in a class this size with many representations at many different times, the diverse issues of reliance alone preclude the existence of common issues of law and fact. Subjective reliance as these defendants urge is not now an element of proof necessary to prevail on this action, see *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972); see also the discussion in *Grad v. Memorex Corp.,* 61 F.R.D. 88, 97-101 (N.D. Cal. 1973), and thus does not destroy the

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[8]The defendants argue forcefully that lack of privity distinguishes this case from those cases which hold that neither subjective reliance nor scientor are required to prevail in 10b-5 suits. They further argue that these elements must be proved and that the application of Rule 23 cannot change this substantive requirement. To the extent it is necessary to decide this issue on this motion the Court finds defendant's arguments unpersuasive. See the discussion in *Grad v. Memorex, cited infra.*

question of commonness here. The more reasonable reliance theory commonly applied in these large security cases is causal connection or causal nexus. Although proof of the causal nexus between the alleged fraud and the inflated price and the harm incurred will undoubtedly be complex, it neither precludes commonness nor typicality. At this point, the Court also cannot say that it would make this class inherently unmanageable.

CONFLICTS

First, Ampex argues that the application of the correct damage theory to these facts would create irreconcilable conflict among the members.[9] Assuming *arguendo*, that the appropriate damage formula is out-of-pockets as urged by defendants, and also that the intrinsic value of the stock is measured by the difference between the price immediately before and the price immediately after the partial corrections, the Court is still unpersuaded that irreconcilable conflicts between the members destroy commonality of issues or render the class unmanageable. After studying the number of examples presented in the papers, the Court is not convinced that the proofs required to prove one member's damage or the plaintiffs' damage operates against the next member's claim or precludes the plaintiff from asserting that member's rights with equal zeal. At this point,

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[9]Problems measuring damages are not usually considered in determining a class, *Herbst v. Able*, 47 F.R.D. 11, 17 (S.D.N.Y. 1969); *Grad v. Memorex, supra; Dorfman v. First Boston Corp.*, Civil Action No. 70-1845 (E.D. Pa. 1973), but when, as here, it is purported that the damage theory may affect the causal connection between the alleged fraud and the injury, defeating commonality and typicality the Court will consider it for that purpose only.

Ampex alleges that the plaintiff's damage theory, the difference between the purchase price and the sales price after partial disclosure, is tantamount to rescissory damages and thus inappropriate in a non-privity situation. They further argue that the correct measure would be out-of-pocket, that is the difference the purchase price and the true value at the time of the purchase [sic]. It is unnecessary to rule on this point at this time.

there is no reason to believe that the members' various positions are diametrically opposed to each other.

It is further argued that under any theory, assuming causation as pleaded, there is an inherent conflict when one member alleges that he sold at a loss while at the same time another member alleges he bought at a fraudulently induced inflated price. If there was only partial disclosure, it is not inconceivable that one member may be selling out at a loss at the same time one member buys in at a price still inflated due to yet undisclosed fraud. Admittedly these circumstances greatly complicate this case but they do not create obvious conflicts which are irreconcilable.

Neither does the Court find persuasive defendant's arguments that debenture purchasers and stock purchasers cannot be represented by a shareholder and are in such conflict with plaintiff as to preclude any commonality of the issues. Although it is not unimaginable that purchasers of debentures could be influenced by considerations other than those influencing stock investors, see *Carlisle v. LTV Electronics, Inc.*, 54 F.R.D. 237 (N.D. Tex. 1972), the Court, at this time is not convinced that these differences exist here.[10] The very nature of the positions of these two security holders does not as a matter of law preclude their inclusion in the same class. See *Fischer v. Kletz*, supra at 384; *In re Ceasars* [*sic*] *Palace Securities Litigation*, CCH Sec.L.R. § 94,005, 94,049.[11] The Court does concede that

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[10]The Court has noted that in C-72-360 SW, *Kushner v. Ampex, et al*, consolidated with the subject case for pretrial proceedings, the complainant is a debenture purchaser and complains of exactly the same wrongdoing in the connection and sale of his security as does plaintiff Molder.

[11]*Dolgow v. Anderson*, 43 F.R.D. 472, 492 (E.D.N.Y. 1968) and *Herbst v. Able*, 278 F.Supp. 669 (S.D.N.Y. 1967), relied on by the defendants, do not militate against this finding since they merely found under their particular circumstances and at the stage of their proceedings, these two groups should not proceed together while recognizing that this would not apply to all situations.

there may well have to be a distinct damage analysis employed to determine debenture holders' losses, but these are problems which can be solved with subclasses. They do not frustrate the certification of this class.

Defendants also urge that there is a conflict between those potential class members who purchased within the 27-month period and have since sold all their shares and those who still now hold their shares, because success of this lawsuit would be to the latter's detriment. Again, if these conflicts do prove viable then appropriate subclasses may be the answer. See *Herbst v. Able,* 47 F.R.D. 11, 15 (S.D.N.Y. 1969).

Finally, defendant Touche Ross claims that if a class is certified it should not be allowed to proceed against them, since they were only involved with *Ampex* for nine of the 117 weeks in the class period. Even assuming the validity of this assertion, this would appear to be irrelevant to certifying the class. See *Fogel v. Wolfgang,* 47 F.R.D. 213 (S.D.N.Y. 1969). Procedural devices are available to Touche Ross to narrow the issues as to them. Also since this is, as of yet, a conditional class necessary adjustments and subclasses could solve this problem.

In accordance with the findings expressed herein, the Court ORDERS that the plaintiffs' motion to certify this class is HEREBY GRANTED subject to the following conditions:

1. the class shall be defined as all those purchasers of Ampex securities between May 2, 1970 and August 3, 1972;
2. the class is a conditional class subject to adjustments by further order of this Court;
3. the class action is limited to the 10b-5 cause of action stated in Count I of plaintiffs' complaint;

4. and plaintiffs shall bear the cost of notifying the class after Court approval of notice form and timing in accordance with *Eisen v. Carlisle & Jacqueline*, 479 F.2d 1005 (2d Cir. 1973).

Dated: April 10, 1974.

/s/ SPENCER WILLIAMS
UNITED STATES DISTRICT JUDGE

APPENDIX C

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

SECTION 10(B) OF THE SECURITIES EXCHANGE ACT OF 1934 (15 U.S.C. § 78j(b)) provides in relevant part as follows:

Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

• • •

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

RULE 10b-5 (17 C.F.R. § 240. 10b-5) provides as follows:
Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE provides as follows:

Class actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the

fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall

include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.